111-676

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1883.

## No. 252.

LEON HENNEQUIN AND DUNCAN McDOUGALL, SURVIVORS, &c., PLAINTIFFS IN ERROR,

vs.

HENRY CLEWS AND THEODORE S. FOWLER.

IN ERROR TO THE SUPERIOR COURT OF THE CITY OF NEW YORK.

FILED MAY 23, 1881.

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1 Court of Appeals.

LEON HENNEQUIN & ano., survivors, &c., appellants,
*ag'st*
HENRY CLEWS & ano., respondents.

*Case and Exceptions.*

C. Bainbridge Smith, attorney for plaintiffs and appellants; J. M. Guiteau, attorney for defendants and respondents.

2 Superior Court of the city of New York.

LEON HENNEQUIN & ano., survivors, &c.,
*against*
HENRY CLEWS & ano.

CLERK'S OFFICE,
Superior Court of the city of New York.

I, Thomas Boese, clerk of the Superior Court of the city of New York, having compared the annexed copy of the record and of the proceedings in the above entitled action with the originals on file in this office, do certify that the same are correct transcripts therefrom, and of the whole of said originals.

In witness whereof, I have hereunto subscribed my name and affixed the seal of the Superior Court of the city of New York, this twenty-first day of May, A. D. 1881.

[SEAL.] THOMAS BOESE, *Clerk.*

3 Court of Appeals.

STATE OF NEW YORK, *ss.*

Pleas in the Court of Appeals held at the capitol, in the city of Albany, on the 25th day of March, in the year of our Lord one thousand eight hundred and eighty-one, before the judges of said court.

Witness the Hon. Charles J. Folger, chief judge, presiding.

E. O. PERRIN, *Clerk.*

*Remittitur.*—March 25, 1881.

LEON HENNEQUIN & ano., app'l'ts,
*ag'st*
HENRY CLEWS & ano., resp'd'ts.

Be it remembered, that on the second day of September, in the year of our Lord one thousand eight hundred and eighty, Leon Hennequin & ano., the appellants in this action, came here into the Court of Appeals, by C. Bainbridge Smith, their attorney,
4 and filed in the said court a notice of appeal and return thereto from the judgment of the general term of the Supe-

rior Court of the city of New York. And Henry Clews & ano., the respondents in said action, afterwards appeared in said Court of Appeals by John M. Guiteau, their attorney. Which said appeal and return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals, having heard this cause argued by Mr. C. Bainbridge Smith, of counsel for the appellants, and by Mr. J. M. Guiteau, of counsel for the respondents, and after due deliberation had thereon, did order and adjudge that the judgment of the general term of the Superior Court of the city of New York, appealed from in this action, be, and the same hereby is, affirmed, with costs. And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said Superior Court, there to be proceeded upon according to law.

Wherefore it is considered that the said judgment be affirmed, with costs as aforesaid.

5 And thereupon, as well as the notice of appeal and the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by them given in the premises, are by the said Court of Appeals remitted into the Superior Court of the city of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Superior Court before the justices thereof *thereof*, &c.

E. O. PERRIN,
*Clerk of the Court of Appeals of the state of New York.*

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *March* 26, 1881.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein attached thereto.

E. O. PERRIN,
[SEAL.] *Clerk.*

6 *Summons for Relief.*

Superior Court of the city of New York.

HENRI HENNEQUIN, LEON HENNEQUIN, and DUNCAN MCDOUGALL, plaintiffs,
*against*
HENRY CLEWS and THEODRRE S. FOWLER, defendants.

*To the defendants:*

You are hereby summoned and required to answer the complaint in this action, which will be filed in the office of the clerk of the said Superior Court, at the New York county court-house in the city of New York, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 115 Broadway, in said city, within

twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated December 17th, 1874.

C. BAINBRIDGE SMITH,
*Plaintiffs' Attorney.*

7 (TITLE OF THE CAUSE.)

The complaint of the plaintiffs above named against the above-named defendants respectfully shows:

I.—That the plaintiffs at the times hereinafter mentioned composed the firm and did business in the city of New York and in the city of Paris, republic of France, under the name of H. Hennequin & Co.

II.—That the defendants Henry Clews and Theodore S. Fowler, at the times herein mentioned, composed the firm of Henry Clews & Co.

III.—That the defendants Fred. Butterfield, Frank H. Inloes, Edward A. Price, Frederick Taylor, and Peter B. Worrall, composed and still compose the firm of Fred. Butterfield & Co.

IV.—That the defendants composing the firm of Henry Clews & Co., on or about the 20th day of October, 1874, made and delivered to the defendant Frederick Taylor a general assignment of all their property for the benefit of their creditors, and the said Frederick Taylor thereupon accepted said assignment and the trusts reposed in him.

V.—That on or about the 27th day of October, 1871, the defendants composing the said firm of Henry Clews & Co., at the request of the plaintiffs, opened a credit on the banking-house of Clews, Habicht & Co., of London, for six thousand pounds sterling, in favor of the said plaintiffs' firm of H. Hennequin & Co., authorizing said last mentioned firm at Paris to draw from time to time bills of exchange on said Clews, Habicht & Co., of London, at ninety days from the respective dates thereof, to the extent of six thousand pounds as aforesaid, with the privilege of renewing any of said bills of exchange; that it was also understood and agreed the said plaintiffs' firm

8 at Paris should remit to Clews, Habicht & Co., of London, a few days before the maturity of each of said bills of exchange the necessary funds to meet and pay the same, so that Clews, Habicht & Co. should not at any time advance any money to pay any of said bills of exchange.

VI.—That in consideration of said credit so given by the defendants composing the firm of Henry Clews & Co., to the plaintiffs, these plaintiffs on or about the 27th day of October, 1871, deposited certain property or securities with the defendants composing said firm of Henry Clews & Co., which it was agreed between these plaintiffs and said Henry Clews & Co. should be held by said Henry Clews & Co.

in trust and for the purpose of securing said last mentioned firm in the event that these plaintiffs failed to remit to the said firm of Clews, Habicht & Co. the requisite funds to pay said bills of exchange at or before the respective maturities thereof, and among such property and securities so deposited by these plaintiffs with the defendants Henry Clews & Co., and which were to be held in trust by them, were 29 first Toledo mortgage bonds of $1,000 each of the Toledo, Peoria and Warsaw Railroad Company, eastern division. That the said bonds were respectively numbered 583, 584, 585, 586, 587, 588, 589, 590, 591 and 592 and 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, and 617, and were of the value of about the sum of $30,000; that the interest thereon was payable semi-annually, to wit, on the first days of December and June of each year, and said interests have been, as the plaintiffs are informed and believe, paid by said company to and received by the defendants or some of them.

VII.—That in the month of September, 1873, the firm of Clews, Habicht & Co., of London, and the defendants Henry Clews
9 & Co., suspended payment and failed to meet their obligations, and on the announcement of such failure and suspension the plaintiffs immediately thereafter paid all said bills of exchange which had been drawn by said plaintiffs on and accepted by said Clews, Habicht & Co., which were then outstanding; and the plaintiffs had prior thereto duly provided for and paid all bills of exchange so drawn by them on said firm by remitting to said firm of Clews, Habicht & Co., of London, the necessary funds before the maturity of said bills of exchange with which to pay the same.

VIII.—That the plaintiffs are not indebted or liable to the defendants Henry Clews & Co., or the said firm of Clews, Habicht & Co., or any or either of them, in any sum or amount whatever.

IX.—That these plaintiffs, after they had paid and taken up all bills of exchange which were outstanding as aforesaid and in the autumn of 1873, demanded of the defendants Henry Clews & Co. a return to them of the securities so deposited with and held by said Henry Clews & Co. in trust for these plaintiffs, and the said Henry Clews & Co. did deliver to the plaintiffs said securities, save and except the said twenty-nine first mortgage bonds of $1,000 each of the Toledo, Peoria and Warsaw Railroad Company, eastern division, of the numbers above mentioned and set forth; that the defendants Henry Clews & Co. have from time to time promised to deliver to the plaintiffs said twenty-nine bonds, but they have neglected and refused to deliver them or any of them.

X.—That on or about the 3d December, 1873, the defendants Henry Clews & Co. delivered to these plaintiffs as security for the return to the plaintiffs of the said twenty-nine first mortgage
10 bonds so held by them in trust twenty-nine bonds of the Burlington, Cedar Rapids and Minnesota Railroad Company, which twenty-nine bonds these plaintiffs still hold as collateral security; that said bonds have at present no market value.

XI.—That on the 13th day of March, 1874, these plaintiffs received from Hiram B. Crosby, esq., who was then attorney for and acting in behalf of said defendants Henry Clews & Co., a letter of which the following is a copy:

NEW YORK, *March 13th*, 1874.

Messrs. H. HENNEQUIN & Co.,
Importers, 461 Broome st.

GENTLEMEN: Since my interview with your Mr. Hennequin on the 11th instant, I would say that the advisory committee have directed Mr. Henry Clews & Co. to deliver to you your Toledo, Peoria and Warsaw bonds on the 11th June next following.

I am, yours respectfully,

HIRAM B. CROSBY.

That the bonds referred to in the foregoing letter are the said bonds of the plaintiffs above set forth, and on the expiration of said 11th June, 1874, these plaintiffs again demanded of the defendants Henry Clews & Co. said bonds, which they have refused to deliver, and still refuse to deliver the same or any of them.

XII.—That the plaintiffs on information and belief allege the said defendants Henry Clews and Theodore S. Fowler, composing the firm of Henry Clews & Co., fraudulently hypothecated with the defendants composing the firm of Fred. Butterfield & Co. the said twenty-nine first mortgage bonds of $1,000 each of the Toledo, Peoria and Warsaw Railroad Company, eastern division, so owned by these plaintiffs, for moneys theretofore loaned and advanced by the said Fred. Butterfield & Co., and that said bonds are still in the possession of said defendants Fred. Butterfield & Co., as these
11 plaintiffs are informed and believe.

XIII.—That the plaintiffs on information and belief allege that the said defendants Henry Clews & Co. have borrowed from said defendants Fred. Butterfield & Co. a large amount of money, amounting to or about half a million of dollars, and that the said defendants Henry Clews & Co. deposited and hypothecated with said Fred. Butterfield & Co., as security for the moneys so borrowed, certain property of the value of or about one million dollars.

XIV.—That if the said defendants Fred. Butterfield & Co. either bought said twenty-nine bonds or advanced any moneys thereon in good faith and without notice of said bonds belonging to these plaintiffs, these plaintiffs allege on information and belief that said defendants Fred. Butterfield & Co. have sufficient of other property in their hands from which they will realize enough to pay their own claims and demands against said Henry Clews & Co., without having recourse to said 29 bonds so belonging to these plaintiffs.

XV.—That by the unlawful conversion of said twenty-nine bonds they have depreciated in value to the amount of from $5,000 to $10,000.

XVI.—The plaintiffs on information and belief allege that Frederick S. Taylor, as assignee of the said Henry Clews and Theodore

S. Fowler, claims some interest in the said 29 first mortgage bonds of $1,000 each of the Toledo, Peoria and Warsaw Railroad Company, eastern division, and in the 29 bonds of the Burlington, Cedar Rapids and Minnesota Railroad Company, held by these plaintiffs as collateral security as aforesaid, and in the surplus moneys that may be in the hands of the defendants Fred. Butterfield & Co. after
12 the payment of their debts, claims and demands against the defendants Henry Clews & Co.

Wherefore these plaintiffs demand judgment:

1. That the defendants Henry Clews & Co. and Fred. Butterfield & Co. deliver to these plaintiffs the said 29 first mortgage bonds of $1,000 each of the Toledo, Peoria and Warsaw Railroad Company, eastern division, with the interests received thereon, together with all damages sustained by these plaintiffs for the conversion thereon.

2. That if the said defendants Fred. Butterfield & Co. shall have advanced any moneys on said bonds in good faith and without notice, then that said defendant Fred. Butterfield be allowed the amount so advanced thereon.

3. That if the said defendants Fred. Butterfield & Co. shall hold and own said 29 bonds in good faith, then that they account to the plaintiffs for the property and securities held by them and received from said defendants Henry Clews & Co., and after the said defendants Fred. Butterfield & Co. shall have been paid therefrom their said claims and demands against said defendants Henry Clews & Co., that they pay the surplus, or so much thereof as shall be necessary to satisfy the plaintiffs' claims, demands, and damages against said defendants Henry Clews & Co.

4. That the plaintiffs have judgment against the defendants Henry Clews & Co. for all damages that said plaintiffs have sustained by reason of the unlawful conversion of said bonds.

5. That an injunction issue restraining the defendants from parting with or disposing of said 29 bonds; that a receiver be appointed, and that the plaintiff have such other and further relief as to the said court shall seem meet.

C. BAINBRIDGE SMITH,
*Attorney for the Plaintiffs.*

Verification.

13 (TITLE OF THE CAUSE.)

I.—The answer of the defendants Henry Clews and Theodore S. Fowler to the complaint in this action by J. M. Guiteau, their attorney, shows to the court, on information and belief, that these defendants, on the twenty-eighth day of November, 1874, on petition of certain of their creditors, were duly adjudicated bankrupts under the laws of the United States, and such proceedings were thereafter had that Nelson J. Tappan, esq., was duly elected and appointed the trustee of said defendants, having as his committee Cornelius F. Timpson, William F. Drake, and Allan H. Munroe, and that the

said trustee succeeds these defendants to all their interest and property in the securities mentioned in said complaint.

II.—This answer admits the allegation contained in section one, two, three, four, and parts of allegations in number five, and as to all other matters and things contained in said complaint not hereinafter controverted or admitted, the same are hereby denied.

III.—This answer further shows, on information and belief, that the plaintiffs' object in making the transactions with these defendants was to have these defendants, for said plaintiffs, place in London, England, money or credit, or both, for the use of said plaintiffs, and in that view certain securities were lodged with these defendants to enable them to place within reach of said plaintiffs the credit and the money required by them and granted to them by these defendants; that in carrying out said object these defendants, from time to time, were to borrow and use the securities so lodged for that purpose in order to place said money or credit, and these defendants say they did use said securities in order to carry out said contract, as above set forth, for the use of said plaintiffs.

14 IV.—This answer further shows that these defendants have no knowledge or information sufficient to form a belief as to whether said acceptances mentioned in said complaint were taken up and paid by the plaintiffs, inasmuch as said plaintiffs never exhibited or offered to exhibit (the same to these defendants, nor offered to exhibit), or deliver up for cancellation the contract or letter of credit received, as is believed, from these defendants, as it was the duty of said plaintiffs to do; nor did they, the said plaintiffs, have a final accounting with these defendants in reference to the transactions between them. Nevertheless this answer shows that on certain representations of the plaintiffs that they, the plaintiffs, would receive other securities, these defendants did, on or about the third of December, 1873, deliver to the plaintiffs twenty-nine first mortgage bonds of the Burlington, Cedar Rapids and Minnesota Railway Company in lieu of the bonds now claimed in said complaint, and as an accord and satisfaction for any and all claims on account of said Peoria, Toledo and Wabash Railroad bonds.

V.—This answer further shows that the letter set forth in said complaint, purporting to be from Hiram B. Crosby, was not written by the authority of these defendants, or approved by them.

VI.—This answer admits that these defendants borrowed a large sum of money from F. Butterfield & Co., and gave them a large amount of securities therefor.

VII.—This answer denies that these defendants fraudulently hypothecated said bonds claimed in the complaint, but alleges that they were hypothecated for the purpose, among other things, of carrying out the letter of credit and the arrangements between plaintiffs and these defendants.

VIII.—They admit their own failure and the failure in bus-
15 iness of Clews, Habicht & Co. September 23d, 1873, and their inability to meet their obligations; they admit the correctness

of the description of the various securities in said complaint, but deny that either have depreciated in value by reason of the non-delivery to plaintiffs of the securities they claim, or that said plaintiffs have suffered damage as set forth.

IX.—This answer further shows that these defendants have no knowledge or information sufficient to form a belief as to whether the statements contained in sections seven and fourteen are true or not.

X.—This answer admits the statements made in section thirteen in said complaint.

XI.—This answer further shows that these defendants cannot state more fully all the facts requisite, as they believe, owing to said bankrupt proceedings and their inability to examine their books and papers.

In consideration of the premises these defendants ask to be hence dismissed with their costs.

J. M. GUITEAU,
*Attorney for above named defendants,*
*Henry Clews and Theodore S. Fowler.*

Verification.

(TITLE OF THE CAUSE.)

The supplemental answer of the defendants Henry Clews and Theodore S. Fowler to the complaint in this action, served by leave of the court first had and obtained, shows to the court that subsequent to the service of the original answer herein, in pursuance of the bankruptcy proceedings mentioned in said answer, and the order of the court of bankruptcy, the District Court of the United States
16 for the southern district of New York, sitting as a court of bankruptcy, did make and order and grant to said defendants certificates of discharge under the seal of said court on the 24th day of December, 1875, discharging the above named defendants, and each of them forever, from all debts and claims which by the Revised Statutes of the United States, title Bankruptcy, are made provable against the estate of said defendants which existed on the 18th day of November, 1874, excepting such debts, if any, as are by said law excepted from the operation of a discharge in bankruptcy.

Wherefore these defendants, Henry Clews and Theodore S. Fowler, ask that whatever claim may, by the judgment of this court, be against them may be adjudged discharged by the aforesaid order and decree of the said United States court, and that these defendants have a judgment for costs in this action and such other relief as to the court may seem just.

J. M. GUITEAU,
*Attorney for above-named defendants.*

Verification.

(TITLE OF THE CAUSE.)

The supplemental answer as amended of the defendants Henry

Clews and Theodore S. Fowler to the complaint in this action, served by leave of the court first had and obtained, shows to the court that subsequent to the service of the original answer herein, in pursuance of the bankruptcy proceedings mentioned in said answer and the order of the court of bankruptcy, the District Court of the United States for the southern district of New York, sitting as a court of bankruptcy, did make an order and grant to said defendants certificates of discharge under seal of said court on the
17 24th day of December, 1875, discharging the above-named defendants and each of them from all debts and claims which by the Revised Statutes, title Bankruptcy, are made provable against the estate of said defendants which existed on the 18th day of November, 1874, excepting such debts, if any, as are by said law excepted from the operation of a discharge in bankruptcy.

The copies certificates of the bankruptcy discharge of each of the defendants are hereby hereunto annexed, marked respectively Exhibit A and B, and to be taken as part of this answer.

And the defendants further allege that the claim and indebtedness set forth in the plaintiffs' complaint herein is one that was discharged by the operation of said bankruptcy discharge, and was provable in said bankruptcy proceedings, and was not one which was exempt from the operation of the bankruptcy statutes.

Wherefore these defendants, Henry Clews and Theodore S. Fowler, ask that whatever claim may, by the judgment of this court, be against them may be adjudged discharged by the aforesaid order and decree of the said United States court, and that these defendants have judgment for costs in this action and such other relief as to the court may seem meet.

J. M. GUITEAU,
*Attorney for the above-named defendants.*

*Exhibit A.*

No. 4992.] [E Pluribus Unum.

District Court of the United States, southern district of New York.

Whereas Henry Clews has been duly adjudged a bankrupt under the Revised Statutes of the United States, title of Bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that the said Henry Clews be forever discharged from all debts and claims which by said
18 title are made provable against his estate and which existed on the eighteenth day of November, 1874, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said title excepted from the operation of a discharge in bankruptcy.

Given under my hand and seal of the court, at the city of New

York, in the second district, this twenty-fourth day of December, A. D. 1875.

[L. S.] SAMUEL BLATCHFORD,
*District Judge.*

Filed this 24th day of December, 1875, at 10 o'clock a. m.

I, George F. Betts, clerk of the District Court of the United States for the southern district of New York, do hereby certify that the above is a true copy of an original certificate of discharge of record and on file in my office as such clerk.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, this 24th day of December, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

GEORGE F. BETTS,
[SEAL.] *Clerk.*

*Exhibit B.*

No. 4992.] [E Pluribus Unum.

District Court of the United States, southern district of New York.

Whereas Theodore S. Fowler has been duly adjudged a bankrupt under the Revised Statutes of the United States, title of Bankruptcy, and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that the said Theodore S. Fowler be forever discharged from all debts and claims which 19 by said title are made provable against his estate and which existed on the eighteenth day of November, 1874, on which day the petition for adjudication was filed against him, excepting such debts, if any, as are by said title excepted from the operation of a discharge in bankruptcy.

Given under my hand and seal of the court, at the city of New York, in the second district, this twenty-fourth day of December, A. D. 1875.

[L. S.] SAMUEL BLATCHFORD,
*District Judge.*

Filed this 24th day of December, 1875, at 10 o'clock a. m.

I, George F. Betts, clerk of the District Court of the United States for the southern district of New York, do hereby certify that the above is a true copy of an original certificate of discharge of record and on file in my office as such clerk.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, this 24th day of December, in the year of our Lord

one thousand eight hundred and seventy-five, and of the Independence of the United States the one hundredth.

GEORGE F. BETTS,
[SEAL.] *Clerk.*

Verification.

*Plaintiffs' Case and Exceptions.*

This action was commenced on the 18th day of December, 1874; the complaint was served on the 1st day of March, 1875, and the answer of the defendants Henry Clews and Theodore S. Fowler was served on the 18th day of April, 1875, and the answer of the defendants Butterfield et al. on the
20 19th day of April, 1875; a supplemental answer was served by the defendant Henry Clews and Theodore S. Fowler on the 10th day of March, 1876, and that answer was amended on the trial of this action, February 13th, 1880, by leave of the court. The *answers* of the original parties plaintiff are Henri Hennequin, Leon Hennequin, and Duncan McDougal. The names of the original parties defendant are Henry Clews, Theodore S. Fowler, Fred. Butterfield, Frank H. Inloes, Edward A. Price, Frederick Taylor, and Peter B. Worrall, and the said Frederick Taylor as assignee of the said Henry Clews and Theodore S. Fowler. The plaintiff Henri Hennequin died after the commencement of this action and before the trial thereof. This action was tried at a special term of this court in February, 1876, and judgment entered January 25th, 1877, dismissing the complaint as to the defendants Fred. Butterfield et al., and directing a trial by jury as to the defendants Henry Clews and Theodore S. Fowler. There has been no other change of parties. This cause came on for trial before the Hon. John J. Freedman, judge, and a jury, on the 12th day of February, 1880, at a trial term of this court.

C. Bainbridge Smith appearing as counsel for the plaintiffs; W. A. Abbott and J. M. Guitean appearing as counsel for the defendants.

DUNCAN MCDOUGALL, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows: I am one of the members of the firm of Henri Hennequin & Co.; in 1871 and 1873 they did business in New York and Paris. The firm was composed of Henri Hennequin, Leon Hennequin, and myself. Henri Hennequin is dead; he died since the commencement of this suit, several years ago, I think. Leon Hennequin resides in Paris. I was ac-
21 quainted with the firm of Henry Clews & Co. About the 27th of October, 1871, I had not personally any transactions with said firm—our firm had. On that day I was at sea on my way to France. I returned in January following. At that time, the 27th of October, 1871, and during my absence, Mr. Auguste Perret had the signature of our firm. Mr. Leon Hennequin was not here during

that time. Mr. Perret was; he is now in Turin, Italy. I first became acquainted with the transactions between our firm and Henry Clews & Co. shortly after I arrived in Paris, by correspondence. I saw Mr. Clews very frequently afterward, but did not refer to this matter for a long time. I don't remember referring to it at all until after his failure; possibly I may have made some remarks about it. Henry Clews & Co. failed, I think, somewhere about the 20th to the 25th of September, 1873. Immediately after hearing of their failure I called to ascertain the probable results. I had a conversation with them at that period. I don't recollect what it was; it was a general conversation. On the 4th of October, 1873, I called on him to advise him that we had a telegraphic message stating that the bills or drafts upon Clews, Habicht & Co. had been paid by our Paris house. I advised him that all the drafts or bills of exchange drawn by Henry Clews & Co., or Clews, Habicht & Co., had been paid. Mr. Clews in reply to that stated that it would be necessary he should have it confirmed by the London house. At that time I asked him for the bonds. In reply he simply said that he could not give me an answer then; that he must wait for confirmation of the fact of the drafts having been paid; he intimated that then he would be prepared to give me the bonds. I called again, probably about a couple of weeks afterwards—sufficient time to receive the confirmation he required. He put me off by some remark that he was not prepared then; it would be necessary to have some further information; I
22 don't recollect what. I asked for the bonds every time; I saw him several times between that date and the beginning of December following, and was met always with a similar excuse, that he was not prepared, and he intimated that it might be necessary to produce the drafts; that went on until the beginning of December; I think the 3d I wrote him a letter. [It was introduced in evidence, and is as follows:]

NEW YORK, *December* 3d, 1873.

MESSRS. HENRY CLEWS & CO., New York.

GENTLEMEN: The writer has made two attempts to see your Mr. Clews last Saturday, but without success, the object of which was to urge upon you the absolute necessity of returning to us the securities remaining in your hands, from those lodged with you on the 27th October, 1871, as collateral security for the prompt payment of drafts of our Paris house on Clews, Habicht & Co., of London, on whom we held your letter of credit for £6,000 in favor of our Paris house. These securities were only subject to your disposal in case of the non-fulfillment of our contract for the prompt payment of the drafts of our Paris house upon Clews, Habicht & Co., of London. This contract has on our part been faithfully and promptly fulfilled, and our last drafts upon Clews, Habicht & Co. were taken up by us when due. Since when we have been unable to procure from you the return of our securities, which we have repeatedly asked for since the 4th or 5th of October last. We are now positively instructed by our Paris house, in case we do not procure at once the return of our

securities, to take legal measures to enforce our demands. You are probably aware of the position in which you have placed yourself by disposing of these securities without any right thereto. Should we not receive them by Saturday noon, we shall feel ourselves
23 compelled, to our regret, to have recourse to judicial means to obtain them. Details of securities on next page. We are, gentlemen, your obedient servants,

H. HENNEQUIN & CO.

Memorandum of securities deposited by us with Henry Clews & Co. as collateral security for payment of credit of £6,000 on Clews, Habicht & Co., London. Deposit made October 27th, 1874, New York:

| | |
|---|---|
| 29 bonds E. D. Toledo, Peoria and Warsaw 1st mortgage 7 per cent | $29,000 |
| 2 bonds W. D. Toledo, Peoria and Warsaw 1st mortgage 7 per cent | $2,000 |
| 4 bonds Alabama and Chattanooga R. R. Co. 1st mortgage 8 per cent. gold | $4,000 |
| Endorsed by state of Alabama. | |
| Certificate 100 shares 1st preferred stock Toledo, Peoria, &c... | $5,600 |
| Warsaw R. R. Co. substituted Oct. 19, 1872, for 6 bonds same co., 1st m't'ge E. D. | |

New York, Dec. 3d, 1873.

H. HENNEQUIN & CO.

The witness proceeded: After I wrote this letter I saw Clews & Co. again, on the 5th or 6th of December. And at that time, after some conversation with Mr. Clews he stated that he was very anxious to give me some other bonds instead, which I declined receiving. The western division bonds were returned to us, not having been hypothecated; all but the 29 bonds Toledo, Peoria & Warsaw eastern division were returned. They were returned about the 5th or 6th of December, 1873. I think Mr. Clews had stated to me before that the 29 bonds of the eastern division had been hypothecated, and I think with whom. He said he would endeavor to substitute other bonds for them, but the parties were unwilling to take them, having a large amount of the bonds
24 he proposed to substitute. The bonds he proposed to substitute were the Burlington, Cedar Rapids and Minnesota. On that day, the 6th December, 1873, he gave me the balance of these securities, except the 29 Toledo eastern division bonds. Some time after this he introduced me to Mr. Hiram Crosby; I don't recollect the time. Mr. Clews stated that Mr. Crosby was the lawyer of the committee of his creditors for the settlement of their business. He said Mr. Crosby had all to say in the matter in regard to getting these bonds and in regard to general matter. I saw Mr. Crosby. Mr. Clews went with me to the office of Mr. Crosby and introduced me to him. I received a letter from Mr. Crosby some time after, I

think the following morning or thereabouts. That is the letter I received. [Letter offered in evidence, marked Exhibit 2, and is as follows:]

LAW OFFICES of GILLETT, CROSBY & STIGER,

Daniel W. Gillett. Hiram B. Crosby. Wm. E. Stiger.

NEW YORK, *March* 13, 1874.

Messrs. H. HENNEQUIN & Co., Importers, 461 Broome St.

GENTLEMEN: Since my interview with your Mr. Hennequin on the 11th instant, I would say that the advisory committee have directed Messrs. Henry Clews & Co. to deliver to you your Toledo, Peoria and Warsaw bonds on the 11th June, next following.

I am, yours respectfully,

HIRAM B. CROSBY.

I waited until about the time mentioned in that letter; a day or two previous to that time I wrote Mr. Crosby a note suggesting that the time had arrived and asking him if he was prepared to give me the bonds. I never received them.

I was familiar with the value of these bonds during the
25 period they were in the possession of Henry Clews & Co. About the 7th August, 1873, they were $92 or $93 or thereabouts; not less than $92. That was $920 for each $1000 bond. They paid seven per cent. interest. On the 4th of October, 1873, they were worth as near as I remember $86 or $87. I think they defaulted on the 1st Nov. As to the present value, the road is now reconstructed, has an additional name; they are the same bonds. I saw quotations $125 to $128, carrying with them the back interest; a portion of the interest, two or three coupons, had in the meantime been paid by another road; the coupons were seven per cent., payable semi-annually.

I have made a calculation of interest on these bonds. I made the calculation at $92 with interest from 7th August, 1873, to this date, 6 years 6 mos. and 6 days.

| | | |
|---|---|---|
| | Principal..... | $26,680.00 |
| | Interest..... | 12,164.95 |
| | Making..... | $38,844.95 |
| Then at $93. | Principal..... | 26,970.00 |
| | Interest..... | 12,297.20 |
| | Making..... | $39,267.20 |

These 29 bonds were in the possession of Henry Clews & Co. from 1871, and up to the time of their failure. The interest on those bonds was paid to us. After that the Illinois Central or some other road paid two or three coupons which were not paid to us, but were collected by Butterfield or Clews; that was after the failure of Henry Clews & Co.

JAMES W. SMITH, called as a witness on behalf of plaintiffs, being duly sworn, testified as follows: I know Mr. McDougall. I was until recently a director in the Toledo, Peoria and Warsaw Railroad Co.

In 1873, August 7, I was a director. I am acquainted with
26 the market value of these bonds as of August 7, 1873, or about that period 1873. On the 11th I sold one of the first mortgage eastern division bonds at $93, that is $930 for each bond; on the 14th August, in 1873, I sold eight of the eastern division of those bonds at $93, that is $930 for each bond; they were sold in the usual course of business regularly; as a director I became familiar with the value from time to time. On the 7th August they ran about that price. I do not know positively what the value was October, 4th, 1873; I know they ranged from $92 to $94, along through there, but I can't say from actual sales.

Cross-examination by J. M. Guiteau:

I sold them through Weston & DeBillier, brokers. I do not know to whom they sold them. The bonds belonged to me. My impression is that the panic of 1873 commenced in September, about the 15th I think. I remember hearing of the failure of Jay Cooke & Co.; the date I cannot tell. I do not know when Fiske & Hatch stopped. I know that the financial condition of New York at that time was generally pretty well upside down. I can't say anything positively as to securities being depressed, from the fact that I had no dealings in them at that time. I was not particularly acquainted with the value of securities from that time on until the 1st of January following. The fact that I sold these bonds is all I know of the value of these securities except from hearsay. As I had no dealings at that time, I cannot say anything as to the securities depreciating. I remember that the banks refused to pass greenbacks over the counter, but would certify checks. I heard that the banks invented a system of certificates for the purpose of tiding over the difficulties.

Re-direct:

At the time I made these sales I made inquiries as to the
27 value—what they would be sold for; my broker told me, and I told them to sell.

JAMES F. SECOR, called as a witness on behalf of the plaintiffs, being duly sworn, testified as follows: I am acquainted with Mr. McDougall. I am not personally acquainted with Henry Clews & Co. I am a director of a railroad. In August, 1873, I was president of the Toledo, Peoria & Warsaw Railroad Co. As such I was familiar with the market value of the first mortgage bonds of the eastern division of that company. On August 7, 1873, my memory is that the market value ran from $92 to $93, that is $920 to $930 for each bond. They were at that time interest-bearing bonds, seven per cent.; they paid that amount up to that time. About October 4th, 1873, the reasonable value was about the same. At the present time,

the last sale of the eastern division was at $1285; $1,253 is the value of each bond including the coupons.

Cross-examination by J. M. Guiteau:

In August, 1873, I was an officer of this road. The interest on the western division was paid on the 1st August, 1873; the first of November interest was not paid; it was made public on the 1st of November. The interest on the eastern division was due Dec. 1st, 1873. In November I knew that the eastern division coupons for the 1st of December would not be paid, and they were not paid, and during November, December, and January the securities naturally depreciated.

Plaintiffs' counsel offers in evidence the judgment roll in this action in this court between the same plaintiffs and defendants and Fredrick Butterfield and others, when the court dismissed the complainant as to Fredrick Butterfield and others, and directed the action as against Henry Clews and Theodore S. Fowler proceed to a trial before a jury, filed herein on the 24th Jan'y, 1877, marked Ex. 8, from which the following was read: "That on or about the
28 27th day of October, 1871, the defendant Henry Clews and Theodore S. Fowler, at that time composing the firm of Henry Clews & Co., opened a credit on the banking-house of Clews, Habicht & Co. of London for six thousand pounds sterling in favor of the said plaintiffs, then composing the firm of said H. Hennequin & Co., and that said plaintiffs thereupon and as collateral security for their performance of the terms of the agreement upon which such credit was opened deposited with said Henry Clews & Co. certain securities, among which were the 29 first-mortgage bonds of the Toledo, Peoria and Warsaw Railroad Company, eastern division, in the complaint described, and to recover which this action is brought.

That on or about the 7th day of August, 1873, the defendant Frederick Butterfield, as agent of the estate of Sarah Hannah Butterfield, and out of the moneys in his hands belonging to said estate, loaned to said Henry Clews & Co. the sum of one hundred and twelve thousand nine hundred and thirty-nine dollars and sixty-nine cents; and the said Henry Clews & Co., as security for the repayment of said loan, deposited with said Fred. Butterfield a large amount of securities, including the twenty-nine bonds in suit.

That as to the defendants Henry Clews and Theodore S. Fowler the issues in this action should be tried by jury.

Plaintiffs' counsel read in evidence deposition of AUGUSTE PERRET, taken under commission, marked Ex. No. 9, and is as follows:

First interrogatory. What is your name, age, and occupation, and where do you reside?

To the first interrogatory he saith: My name is Auguste Perret; age, forty-eight years and upward; by occupation a merchant; and that my residence is in the city of Turin, Italy.

Second interrogatory. Do you know the parties plaintiff and defendant in the title of these interrogatories named, or either of them, and how long have you known them or either of them?

29

To the second interrogatory he said: I am acquainted with all the parties plaintiff and defendant, except, however, Mr. Theodore S. Fowler, in the title of these interrogatories named, all of them, with the above exception, about the same length of time, from the year one thousand eight hundred and fifty-five.

Third interrogatory. State, if you know, the respective businesses of the plaintiffs and defendants, and the names of the firms under which they did business in the year one thousand eight hundred and seventy-one, and where they respectively did business.

To the third interrogatory he saith: The business of the plaintiffs was manufacturing and importing dry goods. The name of the plaintiffs' firm in the year one thousand eight hundred and seventy-one was Henri Hennequin & Co., and their place of business was in Broome street, in the city of New York; the business of the defendants was banking and exchange brokers; the name of the defendants' firm in the year one thousand eight hundred and seventy-one was Henry Clews & Co., and their place of business was in Wall street, in the city of New York.

Fourth interrogatory. Do you know of any arrangement or transactions between the plaintiffs and defendants by which the plaintiffs were allowed to draw certain bills of exchange on the firm of Clews, Habicht & Co.? and if so, state what said arrangement was, and when and by and through whom particularly the same was made.

To the fourth interrogatory he saith: Yea; the arrangement was made by myself in the absense of Duncan McDougall in Europe, one of the firm of the plaintiffs. It consisted in a verbal

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arrangement made with Henry Clews on the 23d or 24th of October, 1871, which was confirmed in a letter dated October 25th, 1871, stating that a credit of six thousand (£6,000) pounds sterling was to be open in London, at the house of Clews, Habicht & Co., in favor of Messrs. Henri Hennequin & Co. of Paris, France, allowing them to draw bills of exchange at 90 days, which were to be paid and provided for a few days before they fell due by Henri Hennequin & Co., with the privilege of three months' renewal, paying Henry Clews & Co. a certain commission and depositing in their hands as collateral securities different bonds amounting to forty-one thousand ($41,000) dollars in currency, with the privilege reserved to Messrs. Henri Hennequin & Co. at any time to exchange such collaterals against others of equal value.

Fifth interrogatory. If you shall state that any securities were deposited by the plaintiffs composing the firm of H. Hennequin & Co., with the defendants composing the firm of Henry Clews & Co.; did the latter firm, or any member thereof, or any person acting on behalf of said firm at the time said securities were deposited with said firm, or at any other time, suggest or state that said securities or any

of them might be hypothecated by said Henry Clews & Co. for any purpose whatever?

To the fifth interrogatory he said: They were deposited, that is, the securities in answer to the preceding fourth interrogatory by the plaintiffs composing the firm of Henri Hennequin & Co. with the defendants composing the firm of Henry Clews & Co. The latter named firm did not at the time, or any member thereof, neither any person acting in behalf of said firm at the time said securities were deposited with said firm, or at any other time suggest or state that said securities or any of them might be hypothecated by Henry Clews
31 & Co. for any purpose whatever. Such a suggestion, in the opinion of the witness, could only be asked by a greenhorn.

Sixth interrogatory. Did the said defendant Henry Clews state to you at the time said securities were so left with him, or suggest to you, that the firm of Clews, Habicht & Co. was a young house without an established discount credit in the London market, and would therefore have to be placed in funds to take up their paper?

To the sixth interrogatory he saith: Never; on the contrary, Mr. Henry Clews, at the time of opening such credit made, gave me to understand that the house of Clews, Habicht & Co. did not need any credit or money, inasmuch as it was to be the United States treasury agency, and consequently entitled to first-rate credit.

Seventh interrogatory. Is your recollection distinct and clear upon the matters enquired of in the fifth and sixth interrogatories, and are there any circumstances connected therewith which enabled you to speak positively; and if yea, state the same?

To the seventh interrogatory he saith: Yea; my recollection is perfectly clear and distinct in these matters inquired of in the fifth and sixth interrogatories. I have no interest at all with either of the plaintiffs or of the defendants; all of them, Mr. Henry Clews as well as the Messrs. Hennequin, were old friends and acquaintances, and when I heard after my return to Europe of the way of acting of Henry Clews & Co. with Henri Hennequin & Co. I considered it a flagrant breach of trust on the part of the defendants, which by the laws of my adopted country could not give occasion to any suit but a criminal one.

Eighth interrogatory. Did the said Henry Clews ever state to you anything of or concerning the standing of the firm of Clews, Habicht & Co., of London; if yea, state where and when, and what he said in relation thereto?

To the eighth interrogatory he saith: "Nay, in this man-
32 ner" the said Henry Clews never stated to me anything of or concerning the standing of the firm of Clews, Habicht & Co., of London, nor did I ever hear any remarks then or afterwards concerning the matter in question.

Lastly. Do you know any other matter or thing touching the matters in question that may tend to the benefit or advantage of the plaintiffs? If yea, declare the same fully and at large as if you had been particularly interrogated thereto.

Lastly, he saith that he knoweth not in this manner nothing. I left New York in the month of November, 1872, and as everything went on smoothly regarding the working of the credit with the house of Henry Clews & Co., I had no occasion to refer to it, except that in the month of October, 1872, a letter was written by Messrs. Hennequin & Co. requesting the exchange of about $10,000 of the securities in the hands of Henry Clews & Co.

The plaintiffs' counsel read in evidence the letters annexed to said commission and referred to in the answer to the foregoing fourth interrogatory, and the same are as follows:

NEW YORK, *October* 25, 1871.

Messrs. HENRY CLEWS & Co., present.

DEAR SIRS: We duly received your yesterday's favor advising us that you were prepared to issue the credit of £6,000 on your London firm and requesting us to furnish you with the necessary details. Please therefore to send us a letter directed to Messrs. Clews, Habicht & Co., London, by which you authorize our Paris house, same firm, to draw on them at 90 days from date for the sum above indicated of six thousand pounds sterling, with the privilege to have said drafts renewed every three months, our Paris house to remit a few days in advance of respective drafts coming due the necessary funds to meet them. We to pay you directly here or to your London house as you decide a commission of one per cent. (1 per cent.) for the opening of the credit and one-half per cent. (½ per cent.)
33 for every renewal, stamps, differences of interest, postage, &c., at our charge in account current at the current London rate of interest. In consideration of said credit which at the present rate of exchange on London and premium on gold here, the gross estimation of which we calculate to be $32,500 cy. We shall deposit in your hands as collateral securities thirty-seven bonds of $1,000 each of the Toledo, Peoria and Warsaw first mortgage 7 per cent. R. R. bonds, the market value of which represents $33,000, and to which if you do not think the same sufficient we could add four bonds $1,000 each of Alabama & Chattanooga R. R., with the understanding, however, that we retain the privilege of exchanging the same for other equally good security, and also the privilege of reducing said amount of collaterals whenever the same compared with the rate of exchange and premium on gold exceeds the equivalent of the amount of your credit of £6,000, or in the contrary case we pledge ourselves to hand you additional collateral security, so as to have you fully covered for said credit. Please to acknowledge receipt of the present, and if accepted should like to have said letter on your London firm for next Saturday's steamer. Have the kindness to let us know, in case of acceptance, if you take the responsibility of guaranteeing us against loss by fire or robbery for our collaterals, or if you wish to deposit the same in a trust and safety deposit co. at our expense.

Yours respectfully,

H. HENNEQUIN & CO.

NEW YORK, *October 27th*, 1874.

Messrs. HENRY CLEWS & Co., 32 Wall street, present.

GENTLEMEN: We hereby acknowledge the receipt of your esteemed favor of to-day, covering letter of credit No. 167 directed to
34 our Paris firm for the amount of six thousand pounds sterling, to be drawn by our said Paris firm on Messrs. Clews, Habicht & Co., of London, at 90 (ninety) days' date; also, contract in accordance with the conditions agreed upon, and which we herewith return you, with the following securities, to remain in your hands as collaterals, and subject to the conditions stated in said contract. They consist of—

| | |
|---|---|
| Nos. 531 & 538, 2 bonds of $1,000 each of the Toledo, Peoria and Warsaw first mortgage R. R., west division, total | $2,000 |
| Nos. 583 to 617, 35 do. $1,000, same bonds, eastern division | 35,000 |
| Nos. 946 to 949, 4 do., $1,000 each. Alabama and Chattanooga 1st mortgage or gold bonds, 8 per cent., endorsed by state of Alabama | 4,000 |
| Total nominal value | $41,000 |

for which please to send us your receipt. Due notice is taken of the responsibility you are assuming for their custody, for which accept our thanks.

41 bonds. Yours respectfully,

H. HENNEQUIN & CO.

Plaintiffs rest.

Defendants' counsel offers in evidence certificate of discharge of Theodore S. Fowler in bankruptcy, dated Dec. 24, 1875, in the U. S. District Court for the southern district of New York; also, certificate of discharge of Henry Clews in bankruptcy, of the same date, same court, in same proceedings, discharging the said bankrupts from all debts and claims which by said title (that is, Rev. Stat. U. S., title of Bankruptcy) are made provable against his estate and which existed on the 18th day of November, 1874, on which day petitions for adjudication were filed.

35 Plaintiffs' counsel objects to the admission of the discharges on the following grounds:

(1.) That it was not averred in the answer that the court had jurisdiction of the defendants.

(2.) The answer does not allege that the plaintiffs' debt was not created by the fraud of the defendants or while acting in a fiduciary capacity.

(3.) The answer does not set out a copy of the discharge.

(4.) By reason of the following order of the court and stipulation

which are now offered and marked Ex. 10 and 11, and read in evidence, and are as follows:

At a special term of the Superior Court of the city of New York, held at the court rooms thereof, in the city of New York, January 17, 1880—

Present: Honorable G. M. Spier.

Superior Court of the city of New York.

HENRY HENNEQUIN, LEON HENNEQUIN, and DUNCAN MCDOUGALL
*against*
HENRY CLEWS and THEODORE S. FOWLER.

On reading and filing the consent of C. Bainbridge Smith, esq., plaintiffs' attorney, dated December 11, 1879, and of J. M. Guiteau, esq., defendants' attorney, and it appearing that the supplemental answer in this action of above named defendants was served on the plaintiffs' attorney on the 10th day of March, 1876, on leave of the court, without the entry of a formal order therefor in writing:

36 Now, therefore, on motion of J. M. Guiteau, esq., defendants' attorney, it is hereby ordered, and the consent of the plaintiffs' attorney being a condition therein, that said answer stand to all intents and purposes the same as if this order had been made and served on the day of the service of said supplemental answer, and that no other or further or amended answer be allowed to be served herein, and no other delay shall ensue by reason thereof, and that said cause shall be restored to the calendar and set down for trial for the first Monday of January, 1880, in part I of this court.

A copy. THOMAS BOESE, *Clerk.*

Superior Court of the city of New York.

HENRI HENNEQUIN, LEON HENNEQUIN and DUNCAN MCDOUGALL,
*against*
HENRY CLEWS and THEODORE S. FOWLER.

It is stipulated and agreed by and between the parties hereto that the plaintiff will accept the supplemental answer of the defendants as of the 10th March, 1876, provided that no other or further answer be allowed to be made or served in this action, and that no other or further delay ensue by reason thereof.

New York, December 11, 1879.

C. BAINBRIDGE SMITH,
*Attorney for Plaintiffs.*
J. M. GUITEAU,
*Attorney for Defendants.*

37 Defendants' counsel offers in evidence the remittitur of the Court of Appeals on the appeal from the order denying motion to vacate order of arrest. Objected to. Admitted. Exception by plaintiffs, marked Defendants' Exhibit C.

It was offered for the purpose of showing that the answer in question formed part of the papers before the Court of Appeals on the appeal from said order.

The court held that the defendants should have leave to amend their supplemental answer by setting forth after the word "bankrupt" and before the word "whereof" certificates of bankruptcy of each of the defendants are hereby annexed, marked respectively Exhibits A and B, and also to amend the said supplemental answer by the word, "and the defendants further allege that the claim and indebtedness set forth in the plaintiffs' complaint herein is one that was discharged by the operation of said bankrupt discharge, and was provable in said bankruptcy proceedings, and was not one which was excepted from the operation of the bankrupt statute.

Amendments objected to by plaintiffs.

Amendments were accordingly made and plaintiffs excepted.

Counsel for defendants then offered in evidence said certificates of discharge in bankruptcy.

Plaintiffs' counsel objects to the bankruptcy discharges being allowed on the grounds—

(1.) That the court has not power to amend the answer by reason of the consent and order so as to admit the discharges.

(2.) That the claim of the plaintiffs against the defendants is of such a character as is not discharged by the bankruptcy of defendants and their discharge.

(3.) That by the bankruptcy act the said claim of the plaintiffs against the defendants falls within the exception mentioned in sec. 15 of the bankrupt act.

38 Objections overruled. Plaintiffs except.

Discharges were then read in evidence, copies of which are annexed to their supplemental answer as amended.

Plaintiffs' counsel asks to go to the jury on the question as to whether the debt was created by fraud.

Denied. Plaintiffs except.

Also on the question whether it was a debt created by the defendants while acting in a fiduciary character.

Denied. Plaintiffs except.

Defendants' counsel moves for a direction of a verdict for the defendants.

The court directs a verdict for the defendants.

To which the plaintiffs duly excepted.

At a trial term of the Superior Court of the city of New York held at the City Hall, in the city of New York, on the 13th day of February, A. D. 1880—

Present: Mr. Justice John J. Freedman.

(TITLE OF THE CAUSE.)

Under the direction of the court the jury say that they find a verdict for the defendants; 30 days' time to plaintiffs to make a case. Judgment to be entered; a stay of 30 days after entry of judgment.

Extract from the minutes.

THOMAS BOESE, *Clerk.*

(TITLE OF THE CAUSE.)

Postea judgment.

It appears that Henry Hennequin died after the commencement of this action, and that the issues in the complaint in this action as to the defendants other than Henry Clews and Theodore S. Fowler having been heard and determined before the Hon. John Sedgwick,
a judge of this court, and said court having, on the 24th day
39 of January, 1877, given judgment against the plaintiffs, dismissing said complaint as to all of said other defendants, and the court having allowed the said defendants, Henry Clews and Theodore S. Fowler, to answer by supplemental answer, setting up their discharge in bankruptcy, and directing a trial by jury of the issues between said last named defendants, Henry Clews and Theodore S. Fowler, and the plaintiffs, and at the trial of this action, February 13th, 1880, before the Honorable J. J. Freedman, a judge of this court, and a jury—

The said court having allowed an amendment to said defendants' supplemental answer, making certified copies of the certificates of discharge a part of said answer, and inserting in said answer the allegations that the claim and indebtedness set forth in plaintiffs' complaint herein is one that was discharged by the operation of said bankruptcy discharge, and was provable in said bankruptcy proceedings, and was not one which was excepted from the operation of the bankruptcy statutes of the United States, and upon the motion of defendants' attorney, the court having directed the jury to render a verdict for the said last-mentioned defendants, and the jury having so rendered their verdict for defendants: Now, on motion of J. M. Guiteau, esq., attorney for said last-mentioned defendants, judgment is rendered upon said verdict, and it is adjudged that Henry Clews and Theodore S. Fowler, defendants, recover their costs of the plaintiffs, Henri Hennequin, Leon Hennequin, and Duncan McDougall, said costs amounting to one hundred and thirty-two dollars and one cent, and that said defendants have execution therefor upon said judgment.

THOMAS BOESE, *Clerk.*

40 *Notice of Appeal.*

GENTLEMEN: Please take notice that the above-named plaintiffs and appellants hereby appeal to the general term of this court from

the judgment entered in this action on the 17th day of February, 1880, in favor of the defendants and against the plaintiffs for the sum of one hundred and thirty-two dollars and one cent ($132.01), and from each and every part of said judgment.

New York, March 13th, 1880.

Yours, &c.,

C. BAINBRIDGE SMITH,
*Att'y for Pl'ffs and App'lts.*

J. M. GUITEAU, esq.,
*Att'y for Def'ts and Respo'd'ts.*

To THOMAS BOESE, *Clerk.*

At a general term of the Superior Court of the city of New York, held at said city at the court-rooms of said court on the twelfth day of May, A. D. 1880—

Present: Hon. William E. Curtis, C. J.; John Sedgwick, judge.

(TITLE OF THE CAUSE.)

The appeal from the judgment entered in this action on the 17th day of February, 1880, in the office of the clerk of said Superior Court, in favor of the defendants and against the plaintiffs, Leon Henequin and Duncan McDougall, survivors, for the sum of
41 $132.01 costs, and all questions brought up by said appeal having been heard at said general term, and the said appeal having been argued by C. Bainbridge Smith, of counsel for the plaintiffs and appellants, and J. M. Guiteau and William A. Abbott, of counsel for respondents, and the court having considered the same and affirmed the said judgment:

Now, on motion of J. M. Guiteau, esq., attorney for said defendants and respondents, it is hereby adjudged that said judgment stand affirmed in all respects, with cost to the respondents and defendants, and that they have execution therefor.

A copy: THOMAS BOESE, *Clerk.*

*Judgment.*—August 5, 1880.

(TITLE OF THE CAUSE.)

The above-named plaintiffs, Leon Hennequin and Duncan McDougall, survivors, having appealed to the general term of this court from a judgment entered against them in favor of the above-named defendants in the office of the clerk of this court on the 17th day of February, 1880, for $132.01 costs, and the said judgment having by said general term been affirmed with costs, and the defendants' costs having been adjusted and taxed at sixty-nine dollars and forty-six cents—

Now, on motion of J. M. Guiteau, esq., attorney of the defendants, it is ordered and adjudged that the said defendants, Henry Clews and Theodore S. Fowler, recover of said plaintiffs, Leon Hen-

nequin and Duncan McDougall, survivors, said sum of sixty-nine dollars and forty-six cents.

THOMAS BOESE, *Clerk.*

42 *Notice of Appeal.*

(TITLE OF THE CAUSE.)

GENTLEMEN: Please take notice that the above-named plaintiffs and appellants hereby appeal to the Court of Appeals from the judgment of the general term of this court entered in this action on the 5th day of August, 1880, in favor of Henry Clews and Theodore S. Fowler, the above-named defendants and respondents, and against Leon Hennequin and Duncan McDougall, the above-named plaintiffs and appellants, for the sum of sixty-nine dollars and forty-six cents ($69.46,) and from each and every part of said judgment.

New York, August 16, 1880.

Yours, &c.,

C. BAINBRIDGE SMITH,
*Att'y for Pl'ffs and App'lts,*
Of. and P. O. address: 145 B'dway, New York city.

To THOMAS BOESE, ESQ., *Clerk.*
JOHN M. GUITEAU, ESQ.,
*Att'y for Def'ts and Resp'ts.*

(TITLE OF THE CAUSE.)

CLERK'S OFFICE, SUPERIOR COURT
OF THE CITY OF NEW YORK.

I, Thomas Boese, clerk of the Superior Court of the city of New York, having compared the annexed copy of judgment roll and notice of appeal to Court of Appeals in the above entitled action with the original on file in this office, do certify that the same are correct transcripts therefrom and of the whole of said original.

43 In witness whereof I have hereunto subscribed my name and affixed the seal of the Supreme Court of the city of New York this 31st day of August, A. D. 1880.

[SEAL.] THOMAS BOESE, *Clerk.*

(TITLE OF THE CAUSE.)

CITY AND COUNTY OF NEW YORK, *ss.*

C. Bainbridge Smith, being duly sworn, says that he is attorney for the plaintiffs; that the general term in affirming the judgment in this case did not render any opinion.

C. BAINBRIDGE SMITH.

Sworn to before me this 13th October, 1880.

BENJAMIN YATES,
4 *Notary Public, New York county.*

50 Allowed by JNO. SEDGWICK, Chief Justice of the Superior Court of the city of New York.

(Endorsed:) Supreme Court of the United States; Leon Hennequin and Duncan McDougall, sur., &c., plaintiffs in error, *agt.* Henry Clews and Theodore S. Fowler, defendants in error; writ of error; C. Bainbridge Smith, att'y for pl'ffs in error; filed April 4, 1881.

51 THE UNITED STATES OF AMERICA.

To Henry Clews and Theodore S. Fowler:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the Superior Court of the city of New York, wherein Leon Hennequin and Duncan McDougall, survivors, &c., are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness Hon. John Sedgwick, chief judge of the Superior Court of the city of New York, the fourth day of April, in the year of our Lord one thousand eight hundred and eighty-one.

JNO. SEDGWICK,
*Chief Judge.*

(Endorsed:) Supreme Court of the United States; Leon Hennequin and Duncan McDougall, surv's, plaintiffs in error, ag'st Henry Clews and Theodore S. Fowler, defendants in error; citation; C. Bainbridge Smith, att'y for pl'ffs in error; due admission service of the within; J. M. Guiteau, def't att'y; April 4, 1881; filed April 5, 1881.

52 Know all men by these presents, that we, James L. Wise, of the city of New York, and Amedee C. Fargis, of the same place, in the state of New York, are held and firmly bound unto Henry Clews and Theodore S. Fowler in the full and just sum of one thousand dollars lawful money of the United States, to be paid to the said Henry Clews and Theodore S. Fowler, their certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this second day of April, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately, in the Superior Court of the city of New York, in a suit depending in said court between Leon Hennequin and Duncan McDougall, survivors, &c., and Henry Clews and Theodore S.

Fowler, judgment was rendered against the said Leon Hennequin and Duncan McDougall, survivors, &c., and the said Leon Hennequin and Duncan McDougall, survivors, &c., having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to be sent to the said Henry Clews and Theodore S. Fowler, citing and admonishing them to be and appear at a Supreme Court of
53 the United States to be holden at Washington on the second Monday of October next—

Now, the condition of this obligation is such, that if the said Leon Hennequin and Duncan McDougall, survivors, &c., shall prosecute their writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and effect.

JAS. L. WISE. [L. S.]
A. C. FARGIS. [L. S.]

Sealed and delivered in the presence of—
BENJAMIN YATES.

CITY AND COUNTY OF NEW YORK, *ss.*

James L. Wise, being duly sworn, says that he is one of the obligors in the foregoing bond; that he is a resident and householder in the state of New York, and worth the sum of one thousand dollars over and above all the debts and liabilities which he owes or has incurred, exclusive of property exempt from levy and sale under an execution.

JAS. L. WISE.

Sworn to before me this 2nd day of April, 1881.

BENJAMIN YATES,
*Notary Public, New York county.*

CITY AND COUNTY OF NEW YORK, *ss.*

Amedee C. Fargis, being duly sworn, says that he is one
54 of the obligors in the foregoing bond; that he is a resident freeholder in the state of New York, and worth the sum of one thousand dollars over and above all the debts and liabilities which he owes or has incurred, exclusive of property exempt from levy and sale under an execution.

A. C. FARGIS.

Sworn to before me this 2d day of April, 1881.

BENJAMIN YATES,
*Notary Public, New York county.*

STATE OF NEW YORK, }
*City and county of New York*, } ss.

On this second day of April, 1881, personally appeared before me James L. Wise and Amedee C. Fargis, to me known to be the individuals described in and who executed the foregoing bond, and severally acknowledged to me that they executed the same.

[SEAL.] BENJAMIN YATES,
*Notary Public, New York county.*

55 (Endorsed:) Superior Court; Leon Hennequin and Duncan McDougall, survivors, &c., ag'st Henry Clews and Theodore S. Fowler; bond on writ of error; C. Bainbridge Smith, att'y for pl'ffs; filed April 4, 1881. I approve of the form of the within bond and of the sufficiency of the sureties therein; N. Y., April 4th, 1881; Jno. Sedgwick, chief judge of the Superior Court of the city of New York.

(Endorsed on cover:) New York city Superior Court; No. 252; Leon Hennequin and Duncan McDougall, survivors, &c., pl'ffs in error, vs. Henry Clews and Theodore S. Fowler; filed 23rd May, 1881; 55 pages.

111-676

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 252.

LEON HENNEQUIN AND DUNCAN McDOUGALL, SURVIVORS, &C.,
*Plaintiffs in Error,*

*vs.*

HENRY CLEWS AND THEODORE S. FOWLER,
*Defendants in Error.*

ERROR FROM THE SUPERIOR COURT OF THE CITY OF NEW YORK.

# BRIEF FOR PLAINTIFFS IN ERROR.

*Filed* _____

C. BAINBRIDGE SMITH,
*Of Counsel for Plaintiffs in Error.*

Evening Post Job Printing Office, N. Y.

# Supreme Court of the United States.

LEON HENNEQUIN AND DUNCAN McDOUGALL, SURVIVORS, &C.,
Plaintiffs in Error,

vs.

HENRY CLEWS AND THEODORE S. FOWLER,
Defendants in Error.

*Brief of Plaintiffs in Error, October Term*, 1883.
*No.* 252.

## Statement of Case.

1. The case is brought here by writ of error directed to the Superior Court of the City of New York to review a judgment of the Court of Appeals of the State of New York, affirming the judgment of the Superior Court in favor of the defendants.

*Record, p.* 26, *fol.* 44.

2. The action was originally commenced against the above named named defendants and Frederick Butterfield and others, composing the firm of Fred. Butterfield & Co., and tried at a Special Term of the Superior Court without a jury, and the complaint was dismissed as to the defendants composing the firm of Fred. Butterfield & Co., and the court directed a trial by jury as to the defendants Henry Clews and Theodore S. Fowler,

*Judgment, Record, p.* 16 *fol.* 28.
*Case, Record, p.* 1, *fol.* 20.

3. The action is in the nature of trover for the fraudulent conversion by the defendants Hen ry Clews & Co. of 29 first mortgage bonds for $1,000 each of the Toledo, Peoria and Warsaw Railroad Company, eastern division, of the value of $29,000.

*Complaint, Record, pp.* 3, 4 *and* 5, *fols.* 7 *to* 11.

4. At the trial, the court directed the jury to render a verdict for the defendants on the ground that "the claim "and indebtedness set forth in plaintiffs' complaint herein "is one that was discharged by the operation of said bank- "ruptcy discharge, and was provable in said bankruptcy "proceedings, and was not one which was excepted from "the operation of the bankruptcy statutes of the United "States." And that is the question involved in this controversy.

*Record, p. 23, fol. 39.*
*Record, p. 22, fol. 38.*

5. The plaintiffs appealed from the judgment entered upon the verdict to the General Term of the Superior Court of the City of New York, which was there affirmed.

*Record, p. 24, fol. 41.*

6. On appeal to the Court of Appeals, that court affirmed the judgment and remitted the record to the Superior Court, where judgment was entered upon the remittitur.

*Record. p. 26, fols. 44, 45, 46.*

7. No opinion of the court was rendered either in the Superior Court or Court of Appeals, but the question was previously determined on an appeal from an order denying a motion to vacate an order of arrest, issued in this action, on which appeal the Court of Appeals reversed and vacated the order of arrest, on the ground that the discharge of the defendants in bankruptcy was a bar to the plaintiffs' debt.

*Hennequin v. Clews 77 N. Y., 427.*

## Assignment of Errors.

FIRST ERROR. The court erred in deciding "that the claim and indebtedness set forth in the plaintiffs' complaint herein is one that was discharged by the operation of said bankruptcy discharge, and was provable in said bankruptcy proceedings, and was not one which was excepted from the operation of the bankruptcy statutes of the United States."

*Record, p. 22, fol. 39.*

SECOND ERROR. The court erred in directing the jury to render a verdict for the defendants, and the plaintiffs' exception thereto is well taken.

*Record, p. 22, fol. 38.*

THIRD ERROR. The court erred in not submitting to the jury, as requested on the part of the plaintiffs, the question whether the plaintiffs' debt was not created by the defendants while acting in a fiduciary character, and the plaintiffs' exception to such refusal is well taken.

*Record, p. 22, fol. 38.*

FOURTH ERROR. The court erred in not submitting to the jury, as requested on the part of the plaintiffs, the question whether the plaintiffs' debt was not created by fraud, and the plaintiffs' exception to such refusal is well taken.

*Record, p. 22, fol. 38.*

FIFTH ERROR. The Court of Appeals erred in affirming the judgment of the Superior Court.

*Record, p. 26, fol. 44.*

## Statement of Facts.

I.—On the 27th day of October, 1871, the defendants Henry Clews and Theodore S. Fowler, composing the firm of Henry Clews & Co., of New York, opened a credit on the banking house of Clews, Habicht & Co., of London, for six thousand pounds sterling, in favor of the plaintiffs, then composing the firm of H. Hennequin & Co., doing business in Paris and New York, with the privilege to have the drafts drawn by the plaintiffs' Paris house on Clews, Habicht & Co. renewed every three months, and the plaintiffs to remit, a few days in advance of the respective drafts coming due, the necessary funds to Clews, Habicht & Co. to meet the same; and the plaintiffs thereupon, as collateral security for their performance of the agreement upon which said credit was opened, deposited with said Henry Clews & Co. certain securities, among which were twenty-

nine first mortgage bonds of the Toledo, Peoria and Warsaw Railroad Company, Eastern Division, and to recover which this action is brought.

*Judgment, Record, p.* 16, *fol.* 28.
*Perret's Deposition, Record, p.* 17, *fol.* 30.
*Plaintiffs' Letter, Record, p.* 19, *fols.* 32, 33.

1. Before the plaintiffs deposited the bonds in question with the defendants Henry Clews & Co., the former in their letter to the latter wrote: "Have the kindness to let us know, in case of acceptance, if you take the responsibility of guaranteeing us against loss by fire or robbery for our collaterals, or if you wish to deposit the same in a trust and safety deposit company at our expense."

*Letter, Record, p.* 19, *fol.* 33.

2. Up to the time of the failure of Henry Clews & Co. the interest on those bonds was paid to the plaintiffs.

*McDougall's Testimony, Record, p.* 14, *fol.* 29.

II.—The firms of Henry Clews & Co. and Clews, Habicht & Co. failed on the 23d September, 1873.

*Defendants' Answer, Record, p.* 7, *fol.* 15.

III.—On the 5th of October, 1873, one of the plaintiffs called on the defendant Clews and advised him that all the drafts or bills of exchange drawn by the plaintiffs' Paris house upon Clews, Habicht & Co. had been paid, and the plaintiff demanded the bonds. Mr. McDougall called from time to time upon Mr. Clews, and the latter stated he had hypothecated the bonds.

*McDougall's Testimony, Record, p.* 12, *fols.* 21, 22.
*Id., p.* 13, *fols.* 23, 24.

IV.—The court found in this action, when Frederick Butterfield and others were parties defendants herein, "That on or about the 7th day of August, 1873, the defendant Frederick Butterfield, as agent of the estate of Sarah Hannah Butterfield, and out of the moneys in his hands belonging to said estate, loaned to said Henry Clews & Co.

the sum of one hundred and twelve thousand nine hundred and thirty-nine dollars and sixty-nine cents; and the said Henry Clews & Co., as security for the payment of said loan, deposited with said Frederick Butterfield a large amount of securities, including the twenty-nine bonds in suit."

*Judgment, Record, p.* 16, *fol.* 28.

V.—The value of these bonds, at the lowest price testified to, was $38,844.95; the highest, $39,267.

*McDougall's Testimony, Record, p.* 14, *fol.* 25.
*Smith's Testimony, Record, p.* 15, *fol.* 26.
*Secor's Testimony, Record, p.* 15, *fol.* 27.

## Points and Argument.

**First Point.**—The plaintiffs' debt against the defendants was created while acting in a fiduciary character and as such was not barred by their proceedings in bankruptcy.

*U. S. R. S.*, § 5117.
*Randall* v. *Brown*, 2 *How. U. S. R.*, 406.
*Matteson* v. *Kellogg*, 15 *Ill.*, 547.
*White* v. *Platt*, 5 *Denio*, 275.
*Flagg* v. *Ely*, 4 *Leg. Ob.*, 100.
*Haile* v. *Smith*, 1 *Bos. & P.*, 562.
*Taylor* v. *Plumer*, 3 *Maul. & S.*, 561.
*Johnson* v. *Worden*, 47 *Verm.*, 457.

I.—The defendants held the plaintiffs' bonds under a special trust. *Lewin on Trusts* (*p.* 4) says: "A special trust is where the transfer to the trustee is to answer some immediate and particular purpose." *Willis on Trustees* (*p.* 1) states it to be "an obligation upon a person arising out of confidence reposed in him to apply property faithfully and according to such confidence." *Bouvier* defines a fiduciary contract to be "an agreement by which a person delivers a thing to another in consideration that he will restore it to him."

*Bouvier Law D. Fid. Cont.*

II.—The plaintiffs never parted with the title to the bonds and never ceased to be the owner of them. In the plaintiffs' letter to the defendants, which accompanied the bonds in question, it is said: "Due notice is taken of the responsibility you are assuming for their custody."

*Letter, Record, p.* 20, *fol.* 34.
*Letter, Record, p.* 19, *fol.* 33.

III.—The plaintiffs' debt against the defendants not only falls within the definitions of a special trust and fiduciary contract as laid down by the several treatises, but the authoritative decisions upon the subject fully sustain the position assumed by the plaintiffs in error, that the defendants held the plaintiffs' bond in a fiduciary character.

In *Randel* v. *Brown*, 2 *How. U. S. R.*, 406, the complainant, Randel wishing to negotiate a loan of $10,000 to be secured on certificates of the funded debt of the Chesapeake and Delaware Canal Company applied to the defendant Brown to aid him in the negotiation with one of the banks of Philadelphia. Randel gave to Brown two certificates of the Canal Company for $5,000 each, and executed to him a power of attorney authorizing him to transfer the certificates to himself or any other person, and that Brown should, upon his own note and the pledge of the certificates, if practicable, obtain a loan for Randel. Brown did not effect the loan, but afterward claimed to hold the certificates for services rendered. The Master to whom it was referred, allowed Brown for his commissions $5,659.64 as compensation for all services rendered, the court held, p. 421, "That the delivery of the certificates by Randel to Brown was not absolute, *but upon trust, and the trust was to raise money.*" The court said (p. 424), "To create a lien on a chattel, the party claiming it must show the just possession of the thing claimed; and no person can acquire a lien founded upon his own illegal or fraudulent act or breach of duty; nor can a lien arise, where from the nature of the contract between the parties it would be inconsistent with the express terms or with the clear intent of the contract. For example, if the goods were deposited in the possession of the party for a particular purpose inconsistent with the notion of a lien,

as to hold them or the proceeds for the owner or a third person (citing many cases)." The court also held that Brown had no lien. The court said: "How, then, can Brown set up a lien on these certificates, holding possession of them as he does *by just as gross a fraud?* There is no aspect in which the question can be placed, consistently with the evidence and the authorities above cited, that will justify the decree in his favor. To permit this decree to stand would be *to sanctify fraud*, and to allow Brown, by taking advantage of his own wrong, to obtain compensation for his services in a court of chancery, upon a case purely cognizable in a court of law, the decree of the Circuit Court is therefore reversed, and the cause is remanded to the Circuit Court with directions to enter a decree for the plaintiff conformably to this opinion, and that the defendant pay costs in both courts."

*Randel* v. *Brown*, 2 *How. U. S. R.*, 406.

In *Matteson* v. *Kellogg*, 15 Illinois, 547, it was held, that when a person receives money or property belonging to another, as agent or bailee, to be paid over or delivered to the principal, or used in a particular way, or for a specific purpose for his use, such property is held or received in a fiduciary capacity, the liability for which is not affected by the discharge in bankruptcy of the agent. This case arose under the Bankrupt Act of 1841. The facts were briefly these: The defendant received four hundred dollars for the purpose of procuring a quarter section of timber land for the plaintiff and his friends. The defendant appropriated this money and afterward took the benefit of the bankrupt act, and when sued for the money, set up his discharge as a bar to the action; the court (p. 549), in its opinion said: "Under this act, the Supreme Court of the United States, in the case of *Chapman* v. *Forsyth*, 2 Howard, U. S. R., 202, decided that money received by a factor on the sale of the goods of his principal, does not create a fiduciary debt within the meaning of that act. The reason assigned for that decision is, that according to the course and usage of trade the factor is permitted to carry such money into account and mingle it with his own money, whereby it ceases to be the money of the principal and be-

comes the money of the factor, who becomes debtor to the principal to that amount. If there be an implied agreement between the principal and the factor, that the latter may take and use the money in his business till called for, by being thus carried into general account, it becomes an ordinary debt, the same as money loaned subject to call. But such was not the character of this transaction. The money was placed in Wright's hands for a particular purpose, with no authority to him to use it in his general business, or appropriate it in any way different from the trust which he assumed when he received the money. It continued to be the principal's money in Wright's hands, as it was in Blish's hands, or even in his own; and using it in any way different from his instructions, and his agreement, *was a breach of trust* which he had assumed, *He did not become debtor to his principal till he misapplied the funds.* Had he bought the land intended to be purchased, or any other lands with this money, and to himself, a resulting trust would have arisen in favor of the principal whose money was thus invested. Had the principals consented that he might use the funds in his business, and then, at a convenient season purchase lands with his own funds for their use, then it would have become an ordinary debt, so soon as he had used the money in pursuance of such consent. I understand the rule to be, where one receives money or property of another as agent or bailee, the title to which is to remain in the principal, and which is to be paid over or delivered to him, or to be used in a particular way or for a specific purpose for his use, that then the money or property is received or held in a fiduciary capacity or as trustee. In such a case a special trust and confidence is reposed beyond the mere credit, and it was against the violation of such confidence that Congress designed to provide by the exception quoted."

*Matteson* v. *Kellogg*, 15 *Ill., R.* 547

In *Haile* v. *Smith*, 1 Bos. & P., 563, George and Henry Brown, of Liverpool, wishing to draw upon the banking house of Samuel Smith & Co., in London, to a large amount, agreed, among other securities given, to consign goods to a mercantile house consisting of the same partners

as the banking house, though under the firm of Smiths & Atkinson; accordingly, he remitted invoice of cargo and the bill of lading endorsed in blank to Smiths & Atkinson, but the cargo was prevented from leaving Liverpool by an embargo. G. & H. Brown then became bankrupts, being considerably indebted to Samuel Smith, Son & Co., and the cargo was delivered to their assignees by the captain; *held*, that Samuel Smith, Son & Co. might maintain trover for it against the captain. *Eyre, Ch. J.:* "The case is now brought to a point in this one short proposition, *viz.*, that the property was transferred to Smiths & Atkinson *upon a trust* in which those who transferred the property and the banking house were concerned. If this case can be maintained, all the objections which occur so forcibly upon the notion of a bargain and sale will be removed. Had it been a bargain and sale accompanied with a sufficient delivery to transfer the property, from that moment the risk of the consignment, and the loss and property upon it, ought to have belonged to the buyers. But if we can suppose that this transfer of property was to stand simply upon the agreement that the cargo should go to Smiths & Atkinson, and should be in effect their property only, for the purpose of their applying the net proceds by way of indemnity to the banking house, then the circumstance of the risk, and of the profit and loss, refer to the trust with which the property was charged, and are thereby accounted for. The *trust* being that the proceeds, whatever they might be, should remain with the consignees applicable to the debt of the banking house, the risk must necessarily remain with the consignees, notwithstanding the change of property, and they must suffer or be benefited by the loss or profits upon the sale." * * * "This will lead to the conclusion that the moment the goods were put on board the *Hawke*, and the bill of lading was endorsed and remitted to Smiths & Atkinson, the property was charged, and was to remain in the hands *clothed with the trust* expressed in the agreement."

*Haile* v. *Smith*, 1 *Bos. & P.*, 563.

IV.—If the defendants had purchased land or other property with the plaintiffs' bonds, the plaintiffs could have followed them into such land or property.

*Story on Agency*, § 229.
2 *Story Eq. Jur.*, § 1258.
*Russell* v. *Allen*, 10 *Paige*, 249.
*Ferris* v. *Van Vechten*, 79 *N. Y.*, 113, 119.
*Hooley* v. *Glave*, 9 *Abb., N. C.*, 8, *where many cases are collected in note, p.* 41.

V.—If the defendants had transferred the bonds to their assignees, the plaintiffs could have recovered them. "No property held by the bankrupts in trust shall pass by the assignment" (*U. S. R. S.*, § 5083), and this proposition affords a strong test whether the plaintiffs' bonds were held by the defendants in any fiduciary character.

*Taylor* v. *Plumer*, 3 *Maul. & S.*, 561.
*Copeman* v. *Gallant*, 1 *Pr. Wms.*, 324.
*Floyd* v. *Day*, 3 *Mass.*, 403.
*White* v. *Platt*, 5 *Denio*, 267.

In *Taylor* v. *Plumer* 3 *Maul. & S.*, 561, a draft for money was entrusted to a broker to buy exchequer bills for a principal, and the broker received the money and misapplied it by purchasing American stock and bullion, intending to abscond with it and go to America, and did accordingly abscond, but was taken before he quitted England, and thereupon surrendered to the principal the securities for the American stock and the bullion, who sold the whole and recovered the proceeds; *held*, that the principal was entitled to withhold the proceeds from the assignees of the broker, who became bankrupt on the day on which he so received and misapplied the money." "After stating the case, his Lordship said: The plaintiff in this case is not entitled to recover if the defendant has succeeded in maintaining these propositions in point of law, viz., that the property of a principal, entrusted by him to his factor for any special purpose, belongs to the principal, notwithstanding any change which the property may have undergone in point of form, so long as such property is capable of

being identified and distinguished from all other property. And, secondly, that all property thus circumstanced is equally recoverable from the assignees of the factor, in the event of his becoming a bankrupt. And, indeed, upon a view of the authorities, and consideration of the arguments, it should seem that if the property in its original state and form *was covered with a trust* in favor of the principal, no change of that state and form *can divest it of such trust*, or give the factor or those who represent him in right any other more valid claim in respect to it than they respectively had before such change. An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. * * * Suppose goods are consigned to a factor who sells them and breaks, the merchant for the money, must come in as a creditor under the commission; but if the money is laid out in the goods, these goods will not be subject to the bankruptcy. Suppose, instead of selling the goods for ready money, he sells for money payable at a future day; if the assignees receive the money, it will be for the use of the merchant; or, suppose, the factor had taken notes for the goods—if his assignees receive the money upon those notes, it will be for the merchant's use."

*Judge Story*, in his *Equity Jur.*, says: "The judgment of *Lord Ellenborough* in this case, is very masterly and deserves an attentive perusal" (2 *Story's Eq. Jur.*, § 1258).

VI.—This case was evidently decided and disposed of by the Court of Appeals, upon the reasoning and authority of *Chapman* v. *Forsyth*, 2 *How. U. S. R.*, 202, and cases of a kindred character. In *Chapman* v. *Forsyth*, the defendant discharged the trust when he sold the plaintiffs' goods in accordance with the instructions given him, and the money arising from the sales was mingled with his own, and there was, therefore, no special or technical trust, but merely an implied one as to the proceeds of the sale. That case is not opposed to Warner *v.* Martin, 11 How. U. S. R., p. 207; for in the latter case the defendant committed a fraud in disposing of the goods which had been consigned to him for sale, by paying a precedent debt with them, due from himself. That act was

a *fraud* while acting in a *fiduciary character*, and a discharge in bankruptcy would not have been a bar to an action against him. The court, in *Hennequin* v. *Clews* (77 *N. Y.*, 427), said: "It is argued that these cases apply to consignments of property to factors, and property entrusted to agents with authority to sell, and that they are therefore distinguishable from the case at bar; *but it seems to us that if there is any difference, it is in favor of those cases, because a greater confidence and trust was reposed in them than in this.*" The court continued in like strain, but the foregoing contains the gist of its reasoning. It is respectfully submitted that the conrt has failed to realize the distinction, which so frequently arises in cases of factors. Those cases may be formulated as follows, and if the case at bar affords any analogy to any of those cases, it is evident that it falls within the class where the factor acts in a fiduciary character, and is liable for a breach of trust:

1. Property in the possession of the bankrupt at the time of the bankruptcy as factor or broker for another, will not pass to the assignees.

*Taylor* v. *Plumer*, 3 *Manl. & S.*, 561.
*Whitfield* v. *Brand*, 16 *M. & W.*, 282.
*Scott* v. *Surman*, *Willes*, 400.
*L'Apostre* v. *LePlaistre*, *cited in* 1 *Pr. Wms.*, 318.

2. If the bankrupt has sold the property, the latter may sue the vendee for the price, if he has not paid it to the bankrupt.

*Id.*

3. If the bankrupt has taken notes for the amount of the goods sold by him, the owner is entitled to them.

*Id.*

4. If the bankrupt has sold the goods and received the price in cash before his bankruptcy, the owner must come in with other creditors and prove for the amount.

So say all the cases, and within this class falls the case of *Chapman* v. *Forsyth*, on which the Court of Appeals relied

as a controlling authority against the plaintiffs' recovering in this action.

5. If the bankrupt had pledged the goods of the owner for a private debt of his own, he is guilty of breach of trust at common law, and in most of the States, by statute, it is a criminal offense.

*Laws of N. Y.*, 1830, *ch.* 179, *p.* 203.
2 *R. S. N. Y., Banks, 6th Ed., p.* 1168-9.
*Scott* v. *Potter*, 93 *Penn. St. R.*, 38.
*Desobry* v. *Tete*, 11 *La. An. R.*, 809.
*Warnen* v. *Martin*, 11 *How. U. S.*, 207.

6. In the case at bar the plaintiffs never parted with the title to or ownership of the bonds. The defendants had no power or authority to sell or hypothecate them. And if, as all the cases hold, these bonds would not have passed to the defendants' assignee in bankruptcy, it is because the bonds were trust property, and the defendants held them in a fiduciary character; and yet the Court of Appeals holds: "It was an ordinary commercial transaction, entered into, as far as appears, in good faith, and the only fraud proved or alleged, is such as may be *implied* by the violation of the duty resting upon the defendants under the contract" (77 *N. Y.*, 429). Is not every trust an ordinary contract, and most of them at least entered into in good faith; and when the trustee appropriates to his own use the trust property, is it an ordinary transaction and to be denominated by the mild term of a violation of duty under the contract? Such a transaction is embezzlement in the ordinary acceptation of the term. "There was no common law definition of the word embezzlement; there never has been and there is not now." (*U. S.* v. *Conant*, 9 *Reporter*, 46; *The King* v. *Bazelay*, 2 *Leach Cr. Law*, 836; *East Cr. L.*, 571-2), and lexicographers have defined embezzlement: "The act of fraudulently appropriating to one's own use what is entrusted to one's care and management" (Webster's Dictionary), and in England this so-called commercial transaction would subject the defendants to an indictment, and on conviction to a punishment in penal servitude for any term not exceeding seven years and not less than five years,

or to be imprisoned for any term not exceeding two years and with or without hard labor, and with or without solitary imprisonment (24 *and* 25 *Vict., c. 96, sec.* 95 ; 3 *Jacob's, Fisher's Dig., p.* 3182, 3183).

VII.—No authoritative decision can be found which contradicts the position assumed on the part of the plaintiffs that these bonds constituted a special and technical trust in the hands of the defendants, and their hypothecation of them created a debt while acting in a fiduciary character. The decisions which are cited on the part of the defendants upon the supposition that they are opposed to the foregoing views, will, on examination, be found to bear very little, if any, analogy to the case at bar.

In *Neal* v. *Clark*, 95 *U. S.*, 704, an executor of an estate sold Neal, the plaintiff in error, a portion of the assets without any actual fraud, and Neal sold them to a third party. At the time of the sale the executor was a man of large means. Clark and Holland became sureties for the executor and filed a bill against the executor, the distributees Neal, Jones and others, ten years after Neal had purchased the bonds, and about seven years after the executor had become insolvent, alleging that the executor, in disposing of the bonds, committed a *devastavit* of the estate, and that in view of the circumstances under which he received them, Neal became a participant in that *devastavit* and was liable to the distributees for the amount of the bonds, and asked that, as sureties, they be subrogated to the rights which the distributees have against Neal. Neal pleaded his discharge, and this court held it was a bar to the action.

*Neal* v. *Clark*, 95 *U. S.*, 704.

The Court of Appeals said that this case is, in principle, decisive of this point.

*Hennequin* v. *Clews*, 77 *N. Y.*, 429.

In *Cronan* v. *Cotting*, 104 Mass., 245, the action was on contract for money had and received; to recover the balance of the proceeds of accepted bills of exchange delivered by the plaintiff to the defendant with directions to collect them and apply to the payment of debts owing from him to

the estate of her husband, of which she was administratrix, so much of their proceeds as should be necessary for that purpose. The cause was tried and verdict for the plaintiff. After the argument of the exceptions and before judgment, the defendant filed her petition in bankruptcy under the bankrupt act of 1867, the court ordered a continuance to await the result of the bankrupt proceedings. The discharge was afterwards granted which she pleaded in bar of judgment in this action. The court held that the debt discharged by the proceedings in bankruptcy in its opinion said: "The debt in this case arose exclusively out of a single transaction between the parties. Its creation involved no element other than that of contract. *The existence of the liability did not spring from any breach of trust.* The only default consisted in the non-payment of the balance due to the plaintiff after satisfying the purpose of the pledge. The debt did not result from but preceded the default." This case falls within the principle decided in *Chapman* v. *Forsyth, 2 How. U. S.*, 202.

In *Woodward* v. *Toune, 127 Mass.*, 41, the first count was for money had and received, and the second count for money collected by the defendant as attorney at law. The facts were these: The plaintiff executed two powers of attorney, the first on his own motion, the second at the suggestion of the defendant for the sale of real estate which belonged to the plaintiff in his own right, and as heir-at-law and for other purposes under which the defendant as attorney for the plaintiff sold real estate and executed deeds and informed the plaintiff that, as the real estate was liable for debts, and as he the defendant might be called upon to pay the debt at any time within two years, he should retain the money, to which plaintiff assented. The court held that the money sued for was not received as administrator, nor even as attorney at law, but as attorney in fact under the power executed to him by plaintiff. In this case the defendant had the power to sell, and the case is also free from fraud or embezzlement.

*Woodward* v. *Toune, 127 Mass.*, 41.

VIII.—One of the provisions of the bankrupt act (*section* 5067), declares that "All demands against the bank-

rupt for or on account of any goods or chattels wrongfully taken, converted or withheld by him may be proved and allowed as a debt to the owners to the value of the property so taken or withheld, with interest." This provision was not intended in any manner to affect the subsequent provision (*sec.* 5117) that "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be in payment on account of such debt." A bankrupt who has obtained goods by fraud, and wrongfully taken, converted or withheld the same would not be discharged of a debt thus created by his proceedings in bankruptcy. A trustee who has converted the property of his *cestui que trust* would still be liable for the debt, notwithstanding his discharge in bankruptcy.

1. An action for a wrongful taking and conversion of goods or chattels is, in some cases, maintainable against a person who is morally innocent of any wrong whatever.

*Pease* v. *Smith*, 61 *N. Y.*, 477.
*Boyce* v. *Brockway*, 31 *Id.*, 490–3.
*McCormick* v. *Penn. R. Co.*, 49 *Id.*, 303–10.
*Warnen* v. *Martin*, 11 *How. U. S.*, 209.

In *Pease* v. *Smith* (61 N. Y., 477) it was held that one, who having purchased stolen goods in the ordinary course of business in good faith, and before any knowledge of the owner's rights, sells and delivers them to a third person, is liable for wrongful conversion.

2. Although the liability of a robber and an innocent purchaser, so far as the remedy for the recovery of the goods or chattels is concerned, is the same, their *status* in bankruptcy would be of a different character. The latter would be discharged from the debt thus created, while the former would remain liable notwithstanding his discharge.

Take for example the principle enunciated by the court in *Coddington* v. *Bay*, 20 J. R., 637. The agents in that case were authorized to sell a certain vessel on credit and to

take approved notes, and instructed to remit those proceeds of the sale to their principal. They effected the sale and received the notes, but instead of remitting them passed those notes to a third party as security against a responsibility which the latter had assumed. The court, by Spencer, *Ch. J.*, said (p. 650): "The principal was clearly and justly entitled to the proceeds of the sale of the vessel, the notes in question. His agents and trustees were guilty of a *grossly fraudulent* abuse of *the trust* in attempting to deprive him of those notes." * * "But suppose," continued the judge, "Randolph and Savage (the agents) had *robbed* the respondent (the principal) of a bag of gold, and their conduct on this occasion, in a moral view, is nearly as bad, and paid it to the appellants as an indemnity upon antecedent responsibilities, would they have a right to hold it if the identity could be traced? I maintain not. Suppose that the agents had been *bailees* of the respondents' goods, and had deposited them as security to the appellants, can there be a doubt that the respondents could have brought trover for the goods? What is the difference between the case last put and the present?

*Coddington* v. *Jay*, 205 *J. R.*, 650–1.

This case is also illustrative of the position of the defendants, *Henry Clews & Co.*, and their fiduciary relations and fraudulent conduct towards the plaintiff in the action at bar. What if the defendants, *Coddington & Co.*, in the case cited, after receiving from the plaintiffs' agents the notes in question, had been discharged in bankruptcy, is there a doubt that their discharge would have been a bar to the action that the plaintiff *Bay* had brought against them? Those defendants had not been guilty of any moral turpitude, and at most they were only guilty of a constructive fraud. On the other hand, what if the agents, *Randolph and Savage*, had been discharged in bankruptcy, would not their "*grossly fraudulent abuse of the trust*" have excluded their debt to the principal from the operation of the bankruptcy discharge?

*Coddington* v. *Jay*, 20 *J. R.*, 637, 650–1.

3. The defendants received the plaintiffs' bond under and in pursuance of a fiduciary contract. There was a moral,

legal and equitable duty and obligation imposed upon the defendants, not only to hold the bonds, but to return them to the plaintiffs. The plaintiffs never parted with the title to them, nor did the defendants acquire any ownership of them. If the defendants had obtained them by any "trick or device," "false representation or deceit," they would have been guilty of a felony.

*Loomis* v. *The People*, 67 *N. Y. R.*, 322.
*Zink* v. *The People*, 77 *Id.*, 114, 122 *to* 129.

So a person may be guilty of a larceny when the original transaction rested in contract.

*Reg.* v. *Goods*, 1 *Carr & Marshmann*, 580.
*S. C.*, 41 *E. C. L. R.*, 317.

4. The court below was confirmed in its view, as it said, "by the provisions of the bankrupt law, which absolutely discharges debts for the conversion of personal property" (77 N. Y., 432). Those provisions were doubtless enacted to relieve an innocent purchaser and others who were liable in law for a tort without being guilty of an intentional wrong, and to remedy in that respect the former bankrnpt law; for under the Bankrupt Act of 1841 it was held that if an action of trover could be maintained the discharge of the bankrupt did not release such *debt;* and consequently, however innocent a person might be in receiving goods and chattels from fraudulent pledgors, or from one who had stolen them, they were all held liable for a conversion, and were excluded from the benefit of a bankrupt's discharge, so far as it related to such *debt.*

*Williamson* v. *Dickens*, 5 *Iredell Law*, 237, *and cases cited.*
*Kennedy* v. *Strong*, 14 *John. R.*, 128.

The English cases are to the same effect, and they uniformly hold that the *form* of the action brought is decisive of the question whether the discharge is a good bar or not.

*Parker* v. *Morton*, 6 *Term R.*, 695.
*Goodlittle* v. *Gorth Dougl.*, 583.
*Parker* v. *Crole*, 2 *M. & P.*, 150.
*S. C.*, 5 *Bing.*, 63.

IX.—If the question of the defendants holding the plaintiffs' bonds in any fiduciary character were in doubt, it should have been left to the jury to determine as a question of fact. (*See assignment of errors, supra.*)

**Second Point.**—The plaintiffs' *debt* against defendants was created by fraud, and as such was exempt from the operation of the bankrupt law. " A debt created by fraud implies confidence and deception. It implies that it arose out of a contract expressed or implied, and the debtor's fraudulent practices by which the creditor was defrauded."

1 *Story Eq. Jur.*, § 187.
*Gale* v. *Gale*, 19 *Barb. R.*, 251.
*Howland* v. *Carson*, 22 *Ohio St. R.*, 628.

In *Gale* v. *Gale*, 19 Barb., 249, 251, the court said: " Fraud in the sense of a court of eqity properly includes all acts, omission and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed, and which are injurious to another, or by which an undue or unconscientious advantage is taken of another." (1 *Story's Eq. Jur.*, § 187.) The plaintiff reposed confidence and trust in Payne, and it was Payne's duty to sell the land for the best price he could get, not to conspire, in the language of the Referee, with Gale to deprive the plaintiff of the land without consideration (*see Reigel* v. *Wood*, 1 *J. C.*, 4204 *Paige*, 229.) The court also said, " It would be a deep reproach upon the law if it could afford no relief under such circumstances."

See *Arthurton* v. *Dalley*, 20 *How. Pr.*, 311, *and cases cited.*

1.—The fraud of the defendants consisted in their fraudulently converting the plaintiffs' bonds to their use. When that unlawful conversion took place the debt, as that word is used in the bankrupt act, was fraudulently created.

*Randel v. Brown*, 2 *How. U. S. R.*, 406.
*Warnen v. Martin*, 11 *Id.*, 208.
*Story on Agency*, § 436-7-8

*Johnson v. Worden*, 47 *Verm.*, 457.
*Stokes v. Mason*, 10 *R. I. R.*, 261.
*Bay v. Coddington*, 20 *J. R.*, 637.
*Matteson v. Kellogg*, 15 *Ill., R.*, 547.

In the last case the court expressly held that "*the agent did not become debtor to his principals till he misapplied the funds.*"

*Id., p.* 549.

II.—The debt was created by the defendants emmbezzling the plaintiffs' bonds.

1. Did not the defendants fraudulently appropriate to their use the plaintiff's bonds intrusted to them? If so, it was an embezzlement. If this State through its Legislature, and the United States through Congress, as in England, had declared that this fraudulent appropriation constituted a crime, would it change the character of the offense, or the nature of the debt because a criminal punishment followed its commission?

2. The defalcation of a public officer is not a criminal offense by common law, and whether made so or not by statute, it creates such a debt as is excluded from the operation of a discharge in bankruptcy.

*U. S. R. S.*, § 5117.
*Hennequin* v. *Clews*, 77 *N. Y. R.*, 429.

In *Arthurton* v. *Daly*, 20 *How. Pr.*, 314, the court held that where money was received by an agent, which was to be applied by him to a specific purpose, his misappropriation of it was a *breach of trust* and *embezzlement.*

3. In all cases of embezzlement, the person guilty of the offense came honestly into possession of the property and the relation rested in contract; but the "trick" and "device" occurred when the property was misapplied, and then, and not until then, *the debt*, as that term is used in the bankrupt act, was created.

4. It is a fundamental maxim of the common law, as it is of the civil law, that no one can acquire title by his own act, without the owner's consent; and it is also a maxim of the common and civil law that a party can acquire no right or advantage by his own wrong, whether it consists of violence or fraud.

*Silsbury* v. *McCoon*, 3 *Comst. R.*, 379, 381. *Note.*

The judgment should be reversed.

C. BAINBRIDGE SMITH,
*Of Counsel for Plaintiffs in Error.*

111-676

SUPREME COURT U.S.
FILED
JAN 29 1884
JAMES H. McKENNEY, Clerk.

# BRIEF FOR DEFENDANTS IN ERROR.

SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1883.

No. 252.

LEON HENNEQUIN AND DUNCAN McDOUGALL, SURVIVORS, &c., PLAINTIFFS IN ERROR.

vs.

HENRY CLEWS AND THEODORE S. FOWLER.

IN ERROR TO THE SUPERIOR COURT OF THE CITY OF NEW YORK.

Supreme Court of the United States.

No. 252. October Term, 1883.

LEON HENNEQUIN *et al.*, Survivors, &c.,

*Plaintiffs in Error.*

*vs.*

HENRY CLEWS and THEODORE S. FOWLER.

# BRIEF FOR DEFENDANTS IN ERROR.

## STATEMENT OF FACTS.

On the 24th day of October, 1871, at the City of New York, an agreement was made between the firm of Hennequin & Co., the survivors of whom are the plaintiffs in error, and the firm of Henry Clews & Co., the defendants in error. The members of the firm of Hennequin & Co. being absent from New York at the time, that firm acted by an agent, Mr. Auguste Perret (Printed record, pp. 11, 12). The agreement in question was a verbal one, and was made by Mr. Perret in behalf of Hennequin & Co., and by Mr. Clews in behalf of his firm.

The terms of said agreement are testified to by Mr. Perret as follows:

"Fourth interrogatory. Do you know of any arrangement or "transactions between the plaintiffs and defendants, by which the "plaintiffs were allowed to draw certain bills of exchange on the firm "of Clews, Habicht & Co.? and if so, state what said arrangement "was, and when, and by, and through whom particularly the same "was made?

"To the Fourth interrogatory he saith: Yea; the arrangement was "made by myself in the absence of Duncan McDougall in Europe, "one of the firm of the plaintiffs. It consisted in a verbal arrange- "ment made with Henry Clews on the 23d or 24th of October, 1871, "which was confirmed in a letter dated October 25th, 1871, stating "that a credit of six thousand (£6,000) pounds sterling was to be "open in London, at the house of Clews, Habicht & Co., in favor of "Messrs. Henri Hennequin & Co. of Paris, France, allowing them to "draw bills of exchange at 90 days, which were to be paid and pro- "vided for a few days before they fell due by Henri Hennequin & Co., "with the privilege of three months' renewal, paying Henry Clews & "Co. a certain commission, and depositing in their hands as collateral "securities different bonds amounting to forty-one thousand ($41,000) "dollars in currency, with the privilege reserved to Messrs. Henri "Hennequin & Co. at any time to exchange such collaterals against "others of equal value."

(See testimony of Perret, p. 17.)

The letter of October 25th, referred to by Mr. Perret, is in evidence

(p. 19), and states the terms or details of the agreement, and the compensation to be received by Clews & Co. for opening the said credit, and said letter announced that Hennequin & Co. would deposit with Clews & Co., "in consideration of said credit" * * "as collateral "securities" thirty-seven bonds of $1,000 each, of the Toledo, Peoria & Warsaw first mortgage 7 per cent. R. R. bonds, and would deposit four bonds of the Alabama & Chattanooga R. R. of the par value of $1,000, in case Clews & Co. considered said 37 bonds insufficient.

The said 37 bonds and said 4 bonds were afterwards deposited with Henry Clews & Co. (pp. 17, 18 and 20), and also other securities (p. 13). Afterwards, sundry drafts or bills of exchange were drawn pursuant to said agreement, and all of them were eventually paid or taken up by Hennequin & Co. Thereupon, in or about September, October and December, 1873, Hennequin & Co. demanded of Henry Clews & Co. a return of said collateral, and the same were returned except 29 of said Toledo, Peoria & Warsaw bonds (pp. 12, 13), which had been hypothecated by Clews & Co. (p. 13.) Mr. Clews proposed to substitute in place of said 29 Toledos other bonds of the Burlington, Cedar Rapids & Minnesota R. R. Co. (p. 13.) Mr. McDougall, a member of the firm of Hennequin & Co., testifies that his firm declined receiving said Burlington bonds instead of the Toledos (p. 13). The complaint, however, admits that Hennequin & Co. held 29 of said Burlington bonds as security for the return of said 29 Toledos, and that same were of no present market value at the time of the answer (p. 4, item X of complaint), and the defendants, in their answer, allege that the 29 Burlingtons were delivered to Hennequin & Co. in lieu of said Toledos, and in accord and satisfaction of all claims on account of said Toledos (p. 7, item IV of answer).

Henry Clews & Co., after the demand on them for the return of the securities in question, were adjudged bankrupts, and received, December 24, 1875, in the United States District Court for the Southern District of New York, discharges in bankruptcy, discharging them from all debts and claims provable on the 18th day of November, 1874.

Their discharges were set up by the defendants in their supplemental answer to the complaint in the action and were offered in evidence. (See supplemental answer p. 8, and admission of certificates of discharges, p. 22).

The complaint alleges that Henry Clews & Co. borrowed from Fred. Butterfield & Co. a large amount of money, amounting to about half a million of dollars, and pledged to secure said loan certain property of the value of about a million dollars, including the 29 Toledo bonds in question (complaint p. 5, items XII and XIII). The answer admits that the defendants borrowed a large sum of money from Butterfield & Co., and gave them a large amount of securities therefor (p. 7, item VI), and alleges in effect that the defendants had the right to pledge said bonds in question. The exact amount of money so loaned to Clews & Co. was $112,939.69, to secure which Clews & Co. pledged the 29 bonds in question and other securities (p. 16).

This action was commenced not only against these defendants in error, Clews & Co., but against the firm of Fred. Butterfield & Co., and Hennequin & Co. demanded judgment that Clews & Co. and But-

terfield & Co. deliver to them said 29 Toledo bonds in question, with interest received thereon, with damages for the conversion, and that if Butterfield & Co. hold the bonds in good faith that they account for the securities received from Clews & Co., and that, after they have been paid therefrom their claims against Clews & Co. they apply the surplus, or sufficient thereof to pay plaintiff's claim against Clews & Co., and that plaintiffs have judgment against Clews & Co. for all damages they have sustained by reason of the conversion of the bonds (complaint, p. 6).

This action was tried at a Special Term of the Superior Court for the City of New York, in February, 1876, and judgment was entered January 25, 1877, dismissing the complaint as to Butterfield & Co., and directing a jury trial as to Clews & Co. (pp. 11–23). This judgment was affirmed by the Court of Appeals (see 43 N. Y. Superior Ct. R., 411, and 76 N. Y., 598).

After the dismissal of the action as to Butterfield & Co., the plaintiffs procured an order of arrest in this action against Clews & Co. The Court of Appeals, however, decided that the arrest order had been improperly granted, and thereupon it was vacated (p. 22).

The ground of this reversal by the Court of Appeals was that the claim in suit was discharged by the bankruptcy discharges, and was not such as is excepted from the operation of the U. S. Bankruptcy Statute.

This case is reported (see Hennequin *et al.*, *v.* Clews *et al.*, 77 N.Y., 427).

After the vacating of the arrest order the action came up for trial. When plaintiff had rested, the attorney of Clews & Co. offered the bankruptcy discharges of Clews & Co. in evidence, and plaintiffs counsel objected to same on grounds that the answer did not contain necessary averments to allow the introduction of said certificates, and on the further ground of a stipulation and order of Court (then offered in evidence by plaintiff's attorney) by which it was claimed the defendants were precluded from having any amendment or further answer after said supplemental answer.

The said order of Court shows that, on consent of plaintiff's and defendants attorneys, and it appearing that the supplemental answer was served March 10, 1876, on leave of Court without entry of a written order therefor, it was thereby ordered that said answer stand as though made and served on the day of the service of the supplemental answer, and that no other or further or amended answer be allowed to be served therein, and that no other delay shall ensue by reason thereof, and that the said cause shall be restored to the calendar and set down for trial for the first Monday of January, 1880. The stipulation, in effect, was that the plaintiff would accept the supplemental answer as of March 10, 1876, provided no other or further answer be allowed to be made or served, and that no other or further delay ensue by reason thereof (See order and consent, p. 21).

The counsel for Clews & Co. then offered the remittitur from the Court of Appeals on the appeal from the order denying motion to vacate the arrest order for the purpose of showing that the answer in question (to wit: said supplemental answer) formed a part of the papers before the Court of Appeals on the appeal from said order

(pp. 22, 23). The said remittitur was admitted in evidence and marked "Defendants Exhibit C," (p. 22). This exhibit does not appear in the Transcript of Record. The "postea judgment," however, does show the substantial fact the said remittitur was offered to prove, to wit: that at the trial in 1876, before Judge Sedgwick of the Superior Court, he made an order allowing the defendants, Clews & Co., to set up by supplemental answer their discharges in bankruptcy (p. 23); and it appears that said trial was in February, 1876 (p. 11), and that the order and consent in question were dated respectively January, 1880, and December 11, 1879 (p. 21). The delay, therefore, in entering the written order was over three years after Judge Sedgwick had made the order, and before the written order was filed the case had gone to the Court of Appeals, and the Supplemental Answer had been accepted and acted upon by both sides as sufficient.

The trial judge, however, allowed the defendants, Clews & Co., to amend their answer, setting up and pleading the bankruptcy discharges more fully, to which plaintiffs excepted (p. 22).

The defendants offered then the said certificates, which were admitted, and the plaintiffs excepted (pp. 22, 20). See certificates attached to Supplemental Answer (pp. 9, 10), to the admission of which plaintiffs counsel objected and excepted.

The plaintiffs counsel then asked to go to the jury on the question as to whether the debt was created by fraud, which request was denied, and to which denial the plaintiffs excepted (p. 22).

Also on the question whether it was a debt created by the defendants while acting in a fiduciary character, which request was denied, and to which plaintiffs excepted (p. 22).

The defendants counsel then moved for a direction of a verdict for the defendants, which was thereupon directed, and to which ruling the plaintiffs excepted (p. 22).

Judgment was entered accordingly (p. 23). The plaintiffs appealed to the General Term of the Superior Court, by which said judgment was affirmed (pp. 23, 24). On appeal to the Court of Appeals the judgment of the General Term was affirmed (pp. 25, 26). This final decision of the Court of Appeals is reported in a memorandum decision, merely stating that the Court "agree to affirm on authority of decision on former appeal." (77 N Y., 427). See Hennequin *v.* Clews, 84 N. Y., 676.

## POINTS.

### I.

The debt sued was discharged by the bankruptcy discharges, and was not such a debt as is excepted from the operation of such discharges by Section 5117 of the R. S. U. S., Title "Bankruptcy."

| | |
|---|---|
| *Hennequin et al vs. Clews et al*, | 77 *N. Y.*, 427. |
| *Id.* | 84 *N. Y.*, 676. |
| *Chapman v. Forsyth*, | 2 *How.*, 202. |
| *Neal v. Clark*, | 95 *U. S.*, 704. |
| *Cronan v. Cotting*, | 104 *Mass.*, 245. |
| *Palmer v. Hussey*, | 87 *N. Y.*, 303. |

| | |
|---|---|
| *Woodward v. Towne,* | 127 *Mass.*, 41. |
| *Zeperink v. Card,* | 11 *Fed. R.*, 295. |
| *Owsly v. Cobin,* | 15 *N. B. R.*, 489. |
| *Opinion by Ch. J. Waite.* | |
| *Re Smith, et al.* | 18 *N. B. R.*, 24. |

**II.**

The amendment of the suplemental answer at the trial was discretionary with the Court, and is not reviewable on appeal.

| | |
|---|---|
| *Richtmeyer v. Remsen,* | 38 *N. Y.*, 206. |
| *New York Code of Civil Procedure,* | § 723. |
| *Old New York Code,* | § 173. |

**III.**

Even if reviewable upon appeal, the amendment should have been allowed.

*(a)* For the reasons stated in an opinion rendered during the trial by the trial judge, and contained in a report of the case reported as Hennequin v. Clews, 46 N. Y. Superior Ct. Reports, 330, see p. 333, *et seq.*, the reasons being, in substance, that the provision against any further amendment of the answer, under the circumstances, "was intended as a provision against a further delay of the trial, and not as "a limitation of the power of the trial judge to grant such amendments as he is expressly authorized by the Code to allow upon the "trial in furtherance of justice."

*(b)* Because the defendants' attorney had no authority or right to make any consent to cut off the defendants from setting up said defense.

*(c)* Because said consent and order were superfluous and unnecessary, and the advantage sought to be got from same was unreasonable and unjustifiable.

*(d)* Because the plaintiffs had failed to raise any objection to the answer for years, by motion or otherwise, and had treated the answer as sufficient.

**IV.**

The amendment to the supplemental answer was allowed out of abundant caution merely. Said answer pleaded the discharge substantially as provided in Sec. 5119, R. S. U. S., Title Bankruptcy.

**V.**

The decision of the foregoing points determine all the exceptions and questions presented by the record for review by the Court deemed of any consequence by the defendants in error.

**VI.**

The judgment in favor of the defendants in error should be affirmed, with costs.

WILLIAM A. ABBOTT,
*Of Counsel for Defendants in Error.*

A.D. 1839. April 23. N°8044.
STEAD'S SPECIFICATION.

FIG. 6.

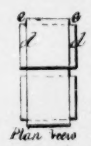



FIG. 7.

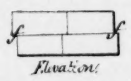



FIG. 8.

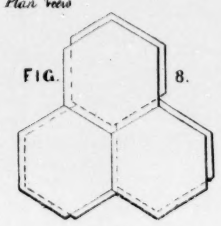


FIG. 9.
*Elevation.*

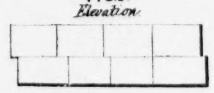


FIG. 16.
*Plan View*
*Showing the spaces between the Blocks either filled up to the crown or partly filled up*

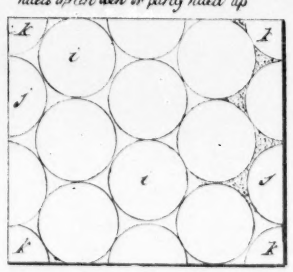



FIG. 17.

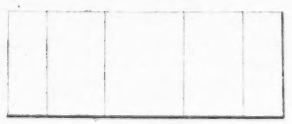


FIG. 14.
*Plan View*

FIG. 15.

FIG. 4.
*Plan View*

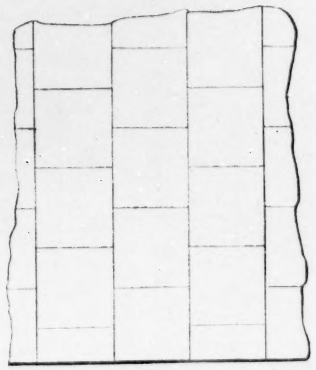


FIG. 5.
*Elevation*

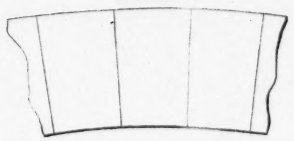


FIG. 12.
*Plan*

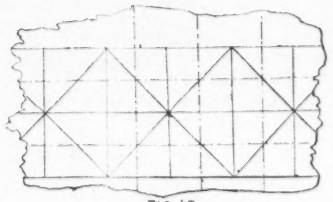


FIG. 13.
*Elevation*

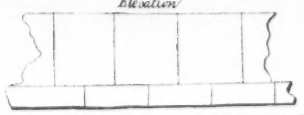


FIG. 1.

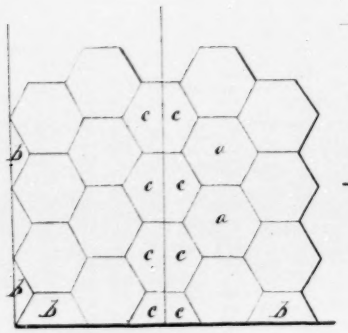



FIG. 2.
*Elevation*

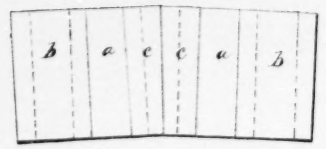



FIG. 10.
*Plan*

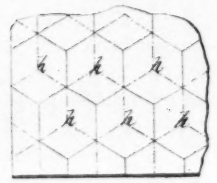



FIG. 11.
*Elevation*

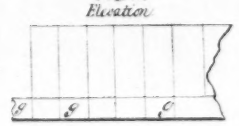



FIG. 3.

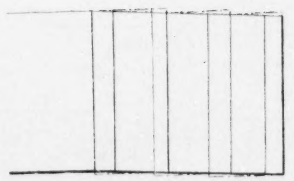


FIG. 20.

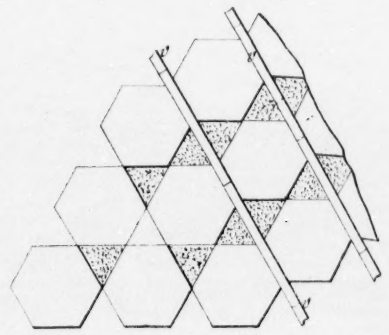


FIG. 21.
*Plan*

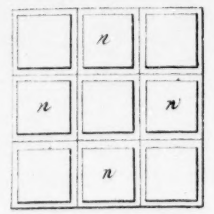
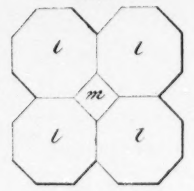



FIG. 18.
*Plan*




No 3423
Phillipson
on
City of Detroit
p. 15

FIG. 22.

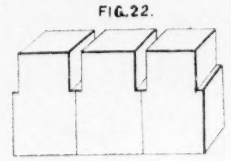


FIG. 19.
*Elevations*

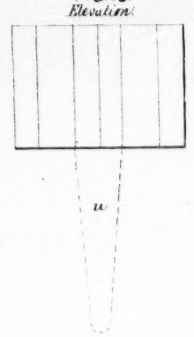



FIG. 23.

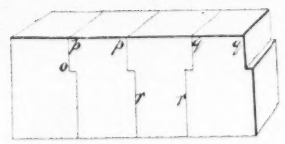



FIG. 24

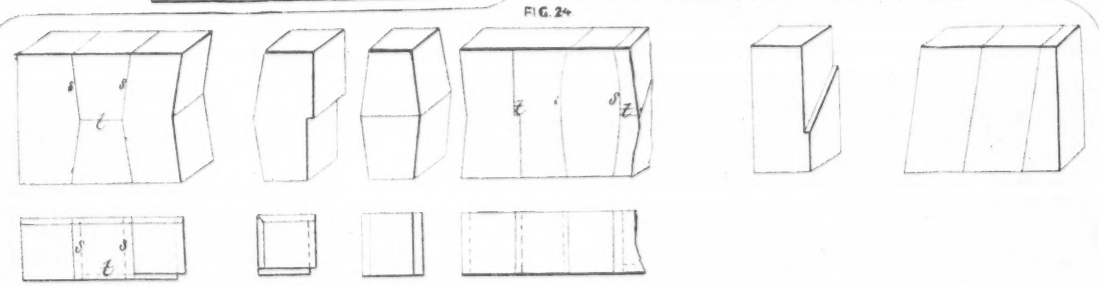
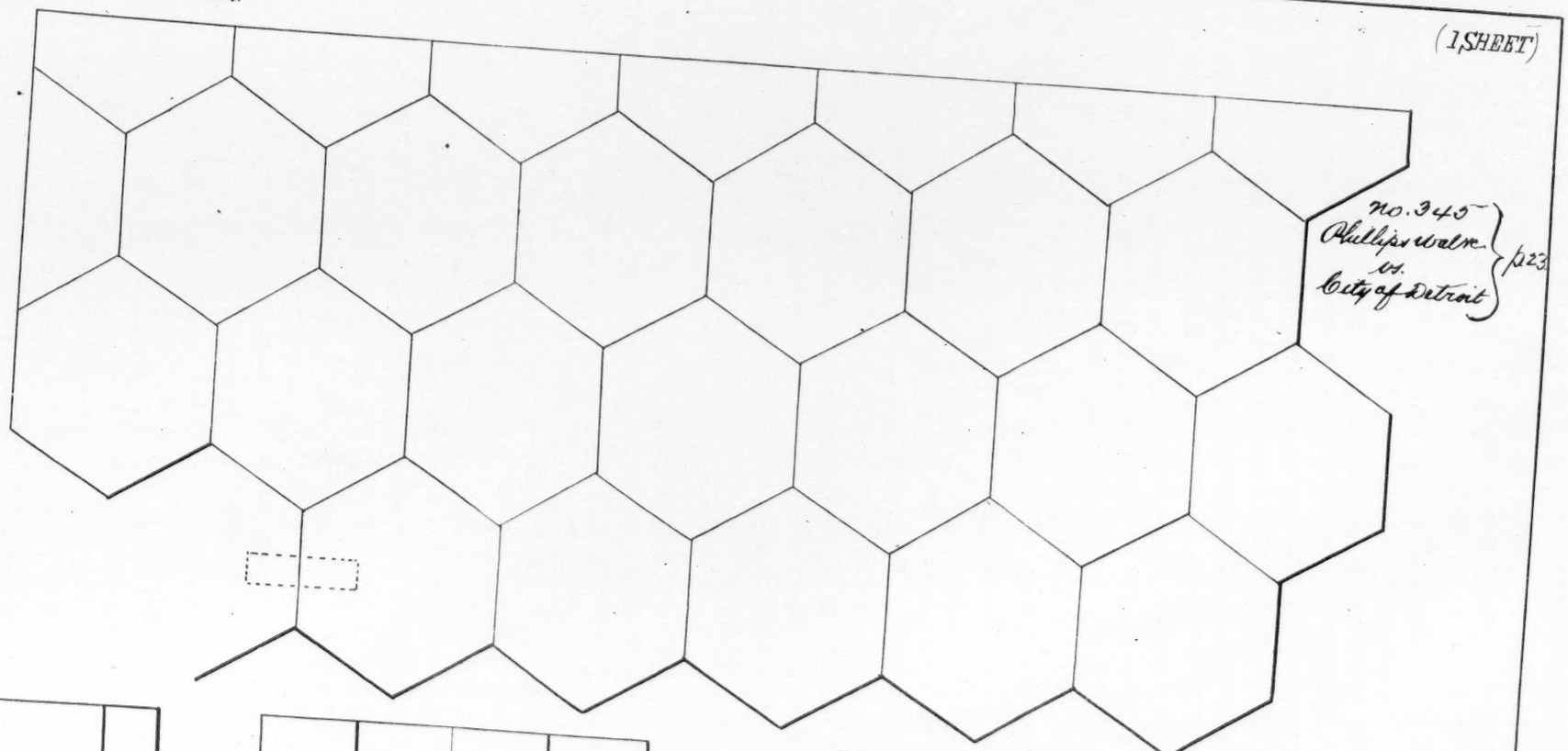



FIG. 25. *Plan View*

A.D. 1838 MAY 19. N° 7645.
STEAD'S SPECIFICATION.

(1 SHEET)



No. 345
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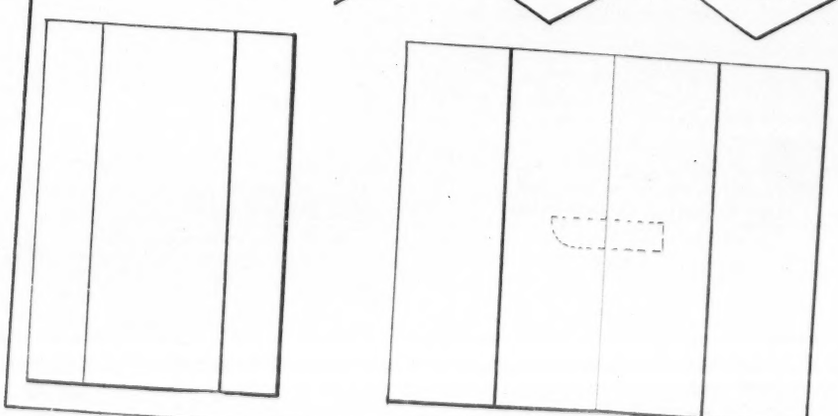
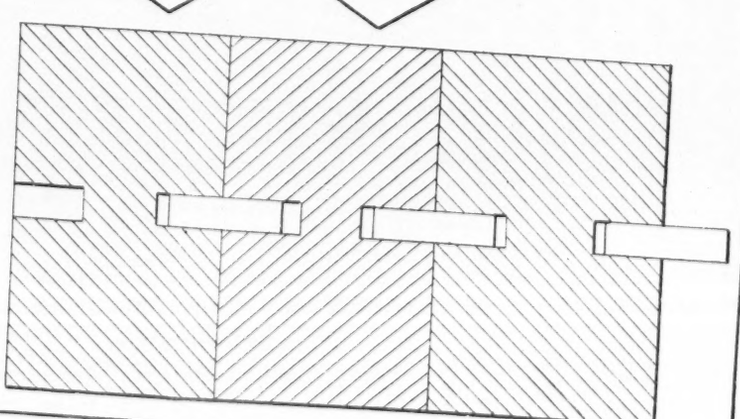
vs.
City of Detroit
p23





A. D. 1841. April 27. N° 8940
REYNOLDS' SPECIFICATION.

(1 SHEET)

No. 345
Phillips et al v.c.
vs
City of Detroit
} p. 449.

FIG. 1.

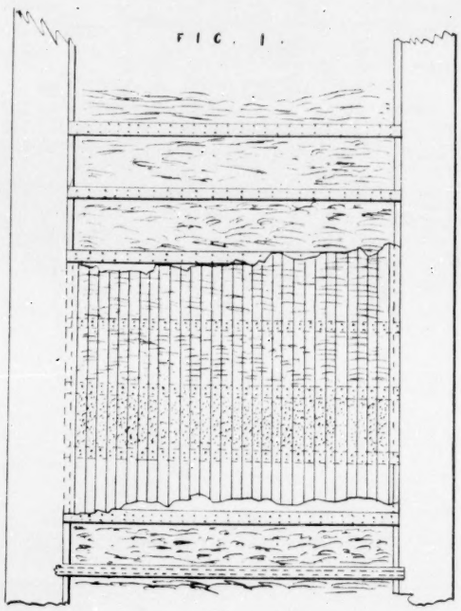


FIG. 3

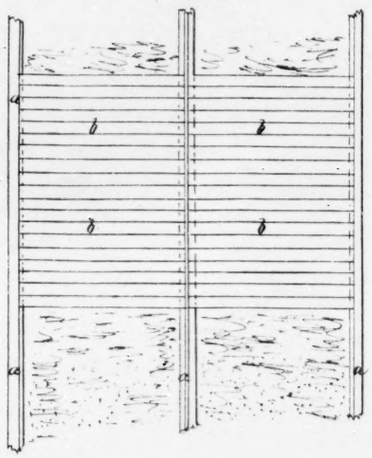


FIG. 5.

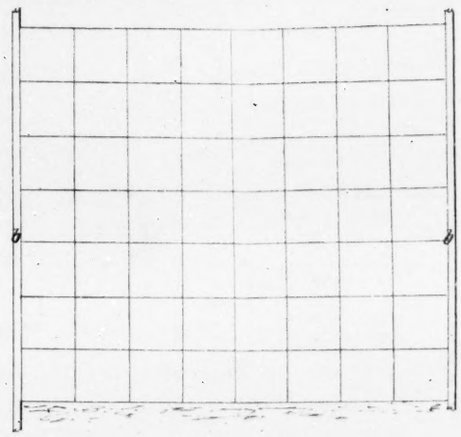


FIG. 2.

FIG. 4.

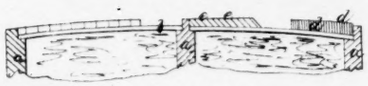


FIG. 6.

FIG. 10.

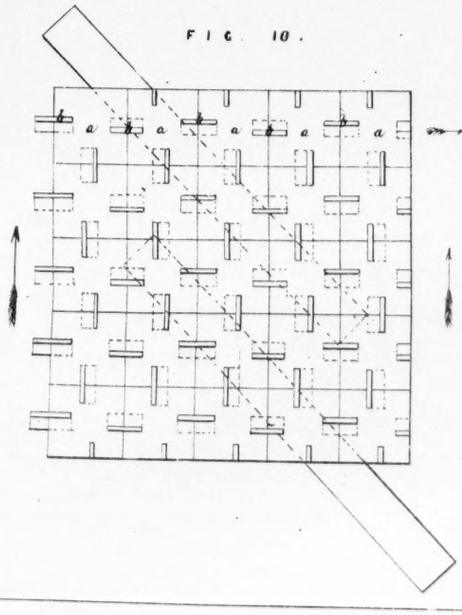


FIG. 11.

FIG. 8

FIG. 9.

FIG. 12.

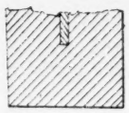
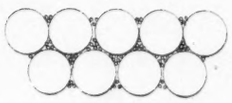


FIG. 7.

FIG. 13.



A. D. 1844. May 15. N° 10,187.
FONTAINEMOREAU'S Specification

7 SHEETS
DRAWING 1.

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Phillips et al vs.
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page 80.

Street's transverse Section

FIG. 1.

Plan

Movable Keys

Longitudinal Section

Street's Transverse Section

FIG. 7

Plan

Longitudinal Section

Street's transverse Section

FIG. 2

Plan

Longitudinal Section

Street's transverse Section

FIG 8.

Plan

Longitudinal Section

Street's transverse Section

FIG. 3

Plan

Longitudinal Section

Street's transverse Section

FIG 9

Plan

Longitudinal Section

Street's transverse Section

FIG. 4.

Plan

Longitudinal Section

Street's transverse Section

FIG 10

Plan

Longitudinal Section

A.D. 1844. May 15. N° 10187.
FONTAINEMOREAU'S SPECIFICATION.

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Phillips et al &c.
vs.
City of Detroit
page 87.

(2 SHEETS.)
SHEET NO. 2.

Street's Transverse Section

FIG. 5 Plan

movable legs

Longitudinal Section

Street's Transverse Section

FIG. 11

Plan

Longitudinal Section

movable legs

Street's Transverse Section

FIG. 8. Plan

movable legs

Longitudinal Section

Street's Transverse Section

Stone Mastic Stone

FIG. 12 Plan

Stone wooden Stone wood

Longitudinal Section

movable legs

Street's Transverse Section

FIG. 13 Plan

movable legs

Longitudinal Section

Street's Transverse Section

FIG. 14. Plan

Longitudinal Section

Longitudinal Section

Street's Transverse Section

FIG. 15 Plan

Longitudinal Section

Longitudinal Section

Street's Transverse Section

FIG. 16 Plan

Longitudinal Section

movable legs

Longitudinal Section

Circular Plate

FIG. 17

movable legs

Longitudinal Section

Plan

A paving block of Fig 15

FIG. 18.

A paving block of Fig 16

FIG 19

A.D. 1825, June 14. N° 5185.
LINDSAY'S SPECIFICATION.

(1 SHEET)

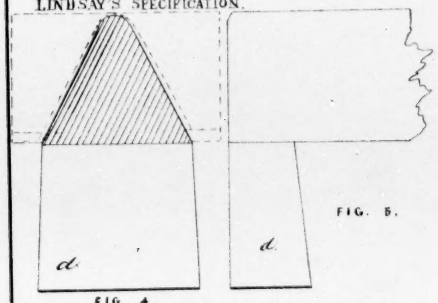



FIG. 5.

FIG. 4.

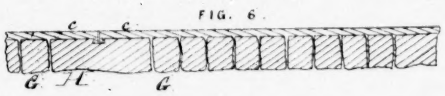



FIG. 6.

FIG. 7.

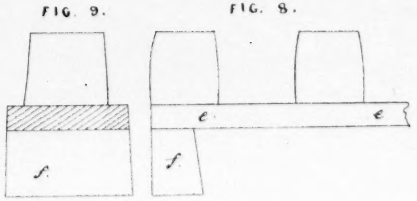



FIG. 9.

FIG. 8.

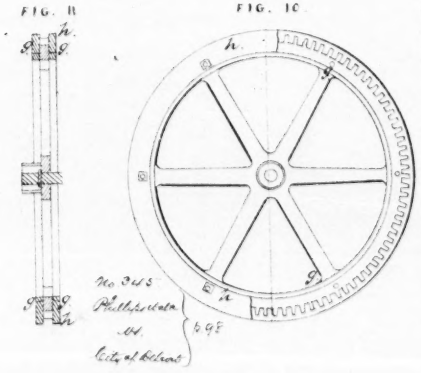



FIG. 11.

FIG. 10.

FIG. 1.

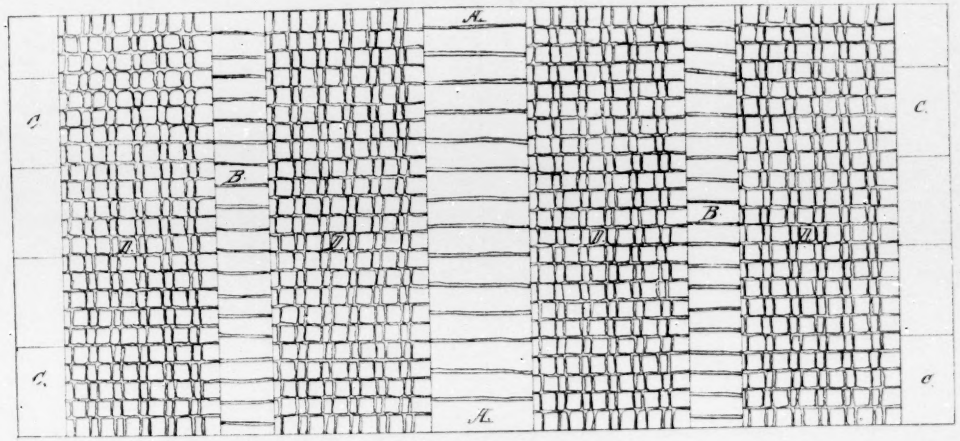
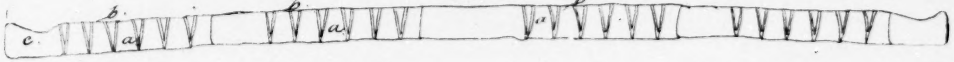
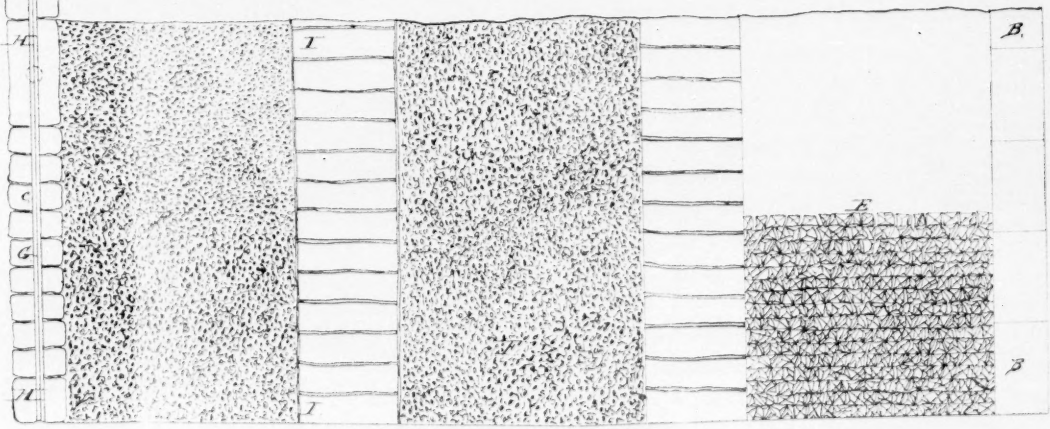
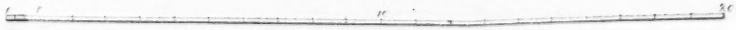



FIG. 2.




Scale of Feet for Figures 1 2 3 & 7.

A.D. 1839. APRIL 9. Nº 8026.
PARKIN'S SPECIFICATION.

(1 SHEET)

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Phillips et al vs.
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FIG. 1.

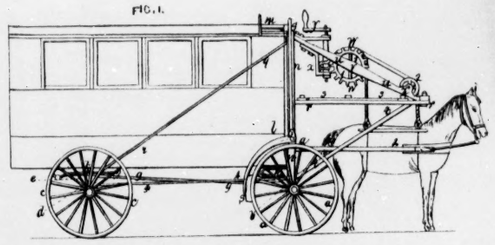


FIG. 3.

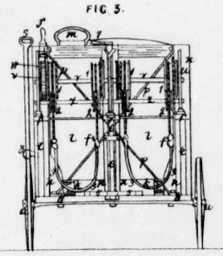


FIG. 2.

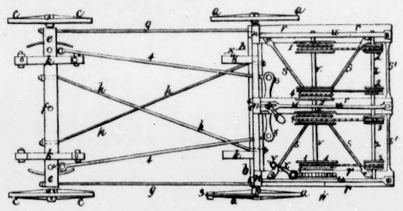


FIG. 4.

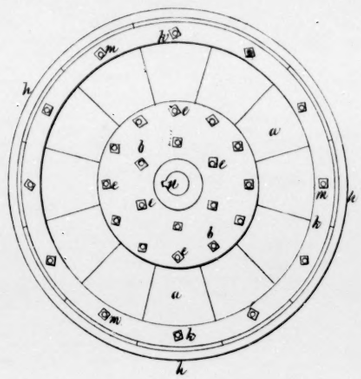


FIG. 32.

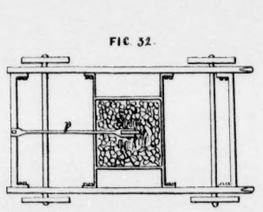


FIG. 31.

FIG. 33

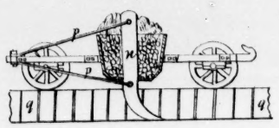


FIG. 6.

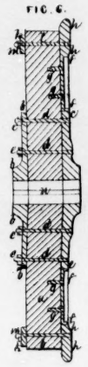


FIG. 5.

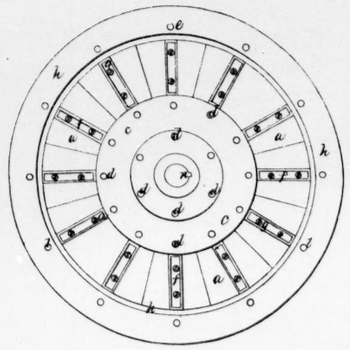


FIG. 13

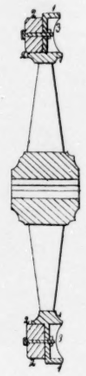


FIG. 11

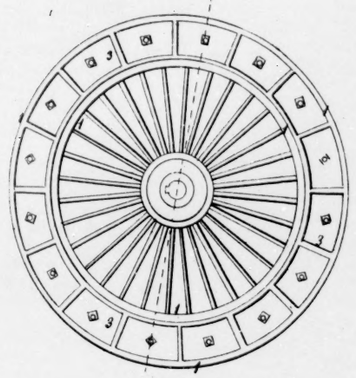


FIG. 8

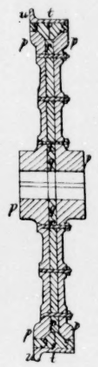


FIG. 7

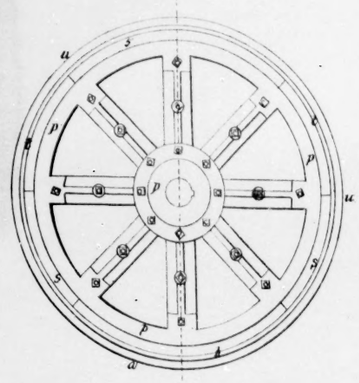


FIG. 12.

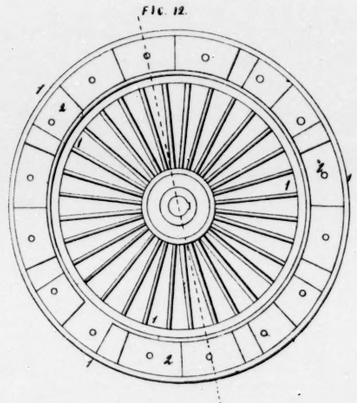


FIG. 10

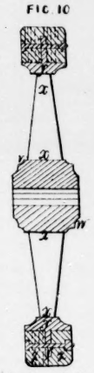


FIG. 9

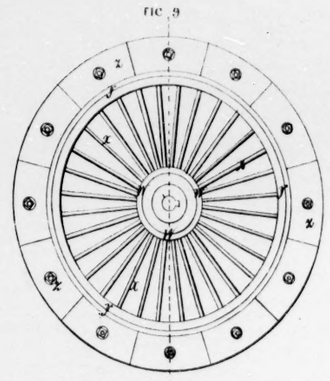


FIG. 15 *

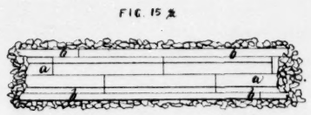


FIG. 15

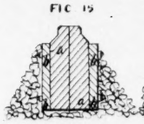


FIG. 14.

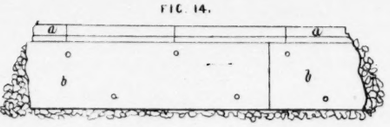



FIG. 21

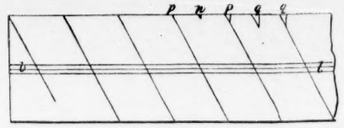


FIG. 22

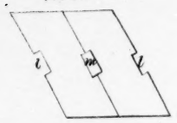


FIG. A

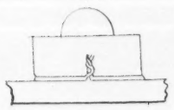


FIG. 17.

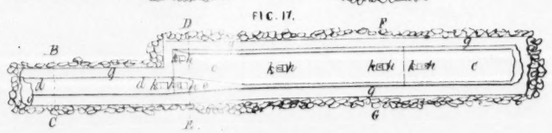


FIG. 16

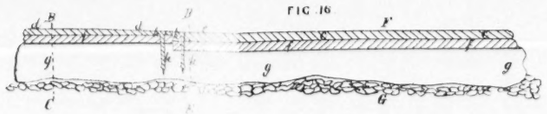


FIG. 18

FIG. 19



FIG. 20

FIG. 24.

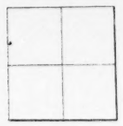


FIG. 23

FIG. 29

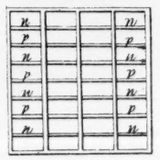


FIG. 25

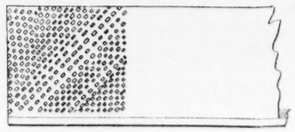


FIG. 26

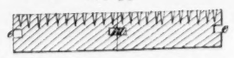


FIG. 27

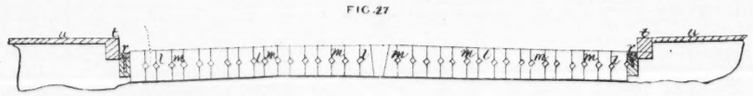


FIG. 28

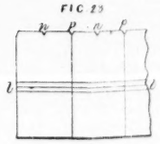
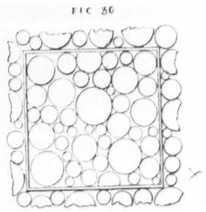


FIG. 30



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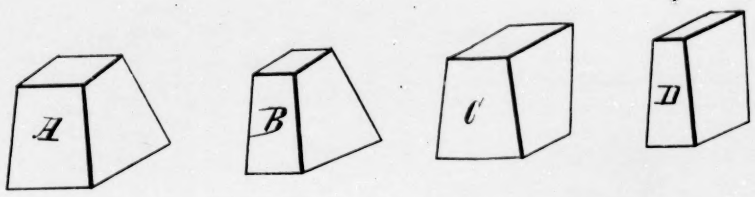


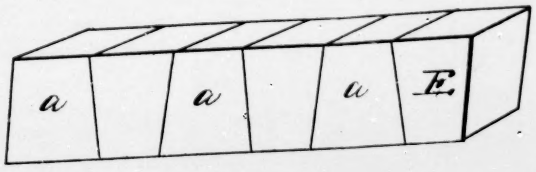


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Phillips et al v.c.
vs.
City of Detroit
} p. 165.